Supreme Court, U.S.
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No.

In the Supreme Court of the United States

FEDERAL AVIATION ADMINISTRATION, PETITIONER

v.

CITY OF ALAMEDA, CITIZENS LEAGUE FOR AIRPORT SAFETY AND SERENITY, BERKELEY KEEP JETS OVER THE BAY, PORT OF OAKLAND, AND COMMISSIONERS, PORT OF OAKLAND

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

KIRK K. VAN TINE
General Counsel
JAMES W. WHITLOW
Deputy Chief Counsel
Federal Aviation Administration
Department of Transportation
Washington, D.C. 20590

THEODORE B. OLSON
Solicitor General
Counsel of Record
THOMAS L. SANSONETTI
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
BARBARA MCDOWELL
Assistant to the Solicitor General
JEFFREY BOSSERT CLARK
RONALD M. SPRITZER
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Under 49 U.S.C. 46110(a), "a person disclosing a substantial interest in an order issued by * * * the Administrator of the Federal Aviation Administration * * * under this part," *i.e.*, Part A of Subtitle VII of Title 49, "may apply for review of the order by filing a petition for review in the United States Court of Appeals." The question presented is:

Whether 49 U.S.C. 46110(a) vests the courts of appeals with jurisdiction to review an order issued by the Federal Aviation Administration (FAA) pursuant to its authority under both Part A and other Parts of Subtitle VII, when the petitioner challenges only the order's determinations under statutory provisions outside Part A.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Federal Aviation Administration, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-5a) is reported at 285 F.3d 1143.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 2002. A petition for rehearing was denied on July 11, 2002 (App., *infra*, 41a). On September 27, 2002, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including November 8, 2002, and, on October 29, 2002, Justice O'Connor extended that time to and including December 6, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 46110 of Title 49 of the United States Code is reproduced at App., *infra*, 42a-43a.

STATEMENT

This case concerns the scope of the courts of appeals' jurisdiction under 49 U.S.C. 46110(a) to review orders of the Federal Aviation Administration (FAA).

1. Subtitle VII of Title 49, the "Aviation Programs" subtitle, is divided into five parts. Part A is designated "Air Commerce and Safety." The remaining Parts are designated "Airport Development and Noise" (Part B); "Financing" (Part C); "Public Airports," specifically those in the Washington, D.C., area (Part D); and "Miscellaneous" (Part E).

Part A contains its own provision governing judicial review, which states, in relevant part:

> [A] person disclosing a substantial interest in an order issued by * * * the Administrator of the Federal Aviation Administration * * * under this part may apply for review of the order by filing a petition for review in the United States Court of Appeals. * * * The petition must be filed not later than 60 days after the order is issued [unless] there

> are reasonable grounds for not filing by the 60th day.

49 U.S.C. 46110(a). In such a case, the court of appeals has "exclusive jurisdiction" to review "any part of the order." 49 U.S.C. 46110(c).

No analogous provision vests the courts of appeals with exclusive jurisdiction to review all FAA orders issued under Parts B through E.[1] Consequently, the district courts retain federal-question jurisdiction to review most orders issued exclusively under those Parts for compliance with the Administrative Procedure Act (APA). Such actions are subject to the six-year limitations period generally applicable to actions against the United States. See 28 U.S.C. 2401(a).

2. In December 2000, the FAA issued a Finding of No Significant Impact and Record of Decision (Order), which approved an airport development program for the Oakland International Airport in California. The Order recites that it is issued "pursuant to 49 U.S.C. 40101 [contained in Part A] and 49 U.S.C. 47101 [contained in Part B]," and is "subject to review by the Courts of Appeals" under 49 U.S.C. 46110. App., *infra*, 40a. The Order contains determinations under Part A, including determinations regarding air commerce and air safety. In particular, in the exercise of its airspace management authority under 49 U.S.C. 40103(b), a provision of Part A, the FAA approved the airport layout plan (which depicts the various components of the airport development program for the Airport), determin-

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[1] Part B contains several provisions conferring jurisdiction on the courts of appeals to review specific types of FAA orders arising under that Part. See 49 U.S.C. 47106(d)(3), 47111(d)(3), 47129(c)(5), 47532. None of those provisions would apply to the Order at issue here.

ing that the plan would involve a safe and efficient use of navigable airspace. App., *infra*, 38a-39a. The Order also contains analyses of issues under statutory provisions other than those in Part A. Thus, the FAA also approved the airport layout plan under 49 U.S.C. 47107(a)(16), a provision of Part B. App., *infra*, 39a. And as relevant here, the FAA prepared an environmental assessment, as required under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332, to determine whether a full environmental impact statement was required for the airport development program for the Airport. The FAA determined that the program would not have a significant impact on the environment, thereby relieving the FAA of the obligation to prepare an environmental impact statement. App., *infra*, 40a.

The City of Alameda, a California municipality, and two private associations challenged the Order by filing a petition for review, pursuant to 49 U.S.C. 46110(a), in the United States Court of Appeals for the Ninth Circuit. The petition did not indicate the nature of the challenge.

It became evident during briefing that the petitioners (respondents here) were challenging the Order solely on the ground that the FAA had allegedly failed to comply with NEPA by, among other things, not preparing a full environmental impact statement, not disclosing significant environmental effects, and not examining sufficient alternatives to the proposed development. App., *infra*, 4a-5a n.3. As relief, the petitioners asked the court of appeals to hold that the Order violated NEPA and to suspend the FAA's approval of the airport layout plan (except its airport roadway component) until the FAA prepared an environmental

impact statement that complied with NEPA. City of Alameda, et al., C.A. Br. 66.

3. The court of appeals held, *sua sponte*, that it lacked appellate jurisdiction under 49 U.S.C. 46110(a) and directed that the case be transferred to the district court. App., *infra*, 1a-5a.

The court of appeals recognized that the FAA had issued the Order "pursuant to both sections [*i.e.*, Parts] A and B of Title 49 Subtitle VII." App., *infra*, 4a. The court concluded, however, that the fact that the FAA had acted, in part, under Part A was insufficient to establish jurisdiction under Section 46110(a). *Ibid.* The court observed that "[t]he FAA actions *challenged by petitioners* * * * concern themselves with matters covered by Part B, Airport Development and Noise, rather than Part A, that concerns Air Commerce and Safety." *Ibid.* Accordingly, the court concluded that those petitioners had "fail[ed] to disclose a 'substantial interest' in an order issued under Part A," as required by Section 46110(a). *Ibid.*

The court of appeals denied the FAA's petition for rehearing en banc. App., *infra*, 41a.[2]

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[2] Subsequently, the other parties to this case (as well as a related case in state court) entered into a settlement agreement. Neither the FAA nor any other component of the United States government is a party to the agreement or participated in its negotiation.

Under the agreement, the other parties to this case are required to seek the entry of an order dismissing the case with prejudice in the district court to which it was transferred. (They are also required to seek entry of a stipulated judgment in the state court case.) As of the date of the printing of this certiorari petition, those parties had not sought such an order in the district court. Entry of such an order would conclude all of the pending claims against the FAA concerning the Order challenged in this case. See also p. 14, n.5, *infra*.

REASONS FOR GRANTING THE PETITION

The FAA issues orders approving airport development projects that contain determinations both under Part A of Subtitle VII of Title 49 with respect to "Air Commerce and Safety," and under other Parts of Subtitle VII. In issuing such orders, the FAA, among other tasks, reviews the project under NEPA and prepares either an environmental assessment or a full environmental impact statement. The court of appeals held that such orders are reviewable under 49 U.S.C. 46110(a)—the judicial review provision applicable to FAA orders issued "under" Part A—only if the petitioner seeks review of the FAA's exercise of authority specifically under Part A. The court of appeals thereby departed from the most sensible construction of Section 46110(a) as providing for review of all aspects of orders issued, in whole or in part, under Part A, regardless of the particular portion of the order that is challenged or the particular ground on which the order is challenged. Its decision conflicts with the decisions of two other circuits applying the statutory predecessor of Section 46110(a), and threatens to complicate and prolong the review of time-sensitive orders approving airport development projects. This Court's review is, therefore, warranted.

1. Section 46110(a) authorizes "a person disclosing a substantial interest in an order issued by * * * the Administrator of the Federal Aviation Administration * * * under this part," *i.e.*, Part A of Subtitle VII, to seek review of the order in the court of appeals. 49 U.S.C. 46110(a). The statutory text is most naturally read as providing for review in the court of appeals whenever the challenged order is, to some extent, a product of the FAA's exercise of its authority under

Part A and the petitioner asserts "a substantial interest" in any aspect of the order. Nothing in the statutory text requires that the petitioner's challenge relate to the particular portions of the order that are the product of the FAA's exercise of authority under Part A, or that the challenge be based on the order's claimed noncompliance with a provision of Part A rather than, for example, with NEPA.

The court of appeals appears to have misunderstood the scope of the "substantial interest" requirement of Section 46110(a). As other courts of appeals have recognized, the requirement that a petitioner identify a "substantial interest" in an FAA order is simply a standing requirement, which assures that the petitioner is sufficiently aggrieved by the issuance of the order to be an appropriate party to challenge it. See *Illinois Dep't of Transp.* v. *Hinson*, 122 F.3d 370, 371 (7th Cir. 1997); see also *Kodiak Airways, Inc.* v. *CAB*, 447 F.2d 341, 344 (D.C. Cir. 1971) (construing "substantial interest" requirement in predecessor provision); *Trans World Airlines, Inc.* v. *CAB*, 339 F.2d 56, 63 (2d Cir. 1964) (same), cert. denied, 382 U.S. 842 (1965). It has not been understood to distinguish among such aggrieved persons depending on the portion of the order at which their challenge is directed or the provision of law on which the challenge is based.

That understanding is reinforced by Section 46110(c), which states that the court of appeals has "*exclusive jurisdiction* to affirm, amend, modify, or set aside *any part* of the order." 49 U.S.C. 46110(c) (emphases added). Section 46110(c) confirms that the court of appeals is not confined to reviewing only those portions of the order that represent an exercise of authority under Part A or to setting aside the order only for noncompliance with a provision of Part A. The court

may instead review all, or any portion, of the order, including a portion issued under a source of authority other than Part A, and may do so to ensure compliance with any provision of law (such as NEPA) on which the validity of the order may depend.

The conclusion that the court of appeals had exclusive jurisdiction to review the Order in this case is especially compelling, because the petitioners in that court sought, as relief, a determination that the FAA's Order approving the airport development program violated NEPA, without limiting that request to particular portions of the Order. City of Alameda, et al., C.A. Br. 66. They also asked the court to "suspend the FAA's approval of the amended Airport Layout Plan," except for its airport roadway component, pending the completion of an environmental impact statement that complied with NEPA. *Ibid.* In its Order, the FAA had approved the airport layout plan "pursuant to 49 U.S.C. 47107(a)(16) [a provision of Part B] *and* 40103(b) [a provision of Part A]." App., *infra*, 39a (emphasis added); see *id.* at 14a (observing that the FAA had reviewed the airport layout plan for conformity with FAA design criteria, including "[d]etermination of effects upon the safe and efficient utilization of navigable airspace pursuant to 14 CFR Parts 77 and 157," both of which implement statutory provisions in Part A). Thus, the petitioners below directly challenged a portion of the Order (the approval of the airport layout plan) that was expressly based on Part A as well as Part B.

2. The Second and Tenth Circuits have held, contrary to the Ninth Circuit here, that exclusive jurisdiction lies in the courts of appeals to review an order that is the product of the FAA's exercise of authority under both Part A and other Parts of Subtitle VII, even when

the petitioner challenges only the FAA's exercise of authority under those other Parts and even when the petitioner challenges the order only on NEPA grounds and other grounds outside Part A. See *Sutton* v. *United States Dep't of Transp.*, 38 F.3d 621, 624-625 (2d Cir. 1994); *National Parks & Conservation Ass'n* v. *FAA*, 998 F.2d 1523, 1526-1528 (10th Cir. 1993). Those cases arose under a predecessor provision that stated, in relevant part, that "[a]ny order, affirmative or negative, issued by the [FAA] under [Chapter 20 of Title 49] * * * shall be subject to review by the courts of appeals * * * upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order." Federal Aviation Act of 1958, Pub. L. No. 85-726, § 1006(a), 72 Stat. 795 (49 U.S.C. App. 1486(a)(1958)). Chapter 20 of Title 49 contained the "Air Commerce and Safety" provisions that now are contained in Part A of Subtitle VII of Title 49.

In those cases, the FAA issued orders approving airport development projects under what is now Part A (and was then Chapter 20 of Title 49) and under what is now Part B, accompanied by review and approval in accordance with NEPA. The orders were challenged solely based on NEPA and on provisions of Title 49 outside Chapter 20. The courts of appeals held that they had exclusive jurisdiction under Section 1486(a), because the FAA had issued the orders, in part, under Chapter 20, although the challenges were not based on the statutory provisions in Chapter 20. As the Second Circuit put it, appellate jurisdiction under Section 1486(a) turned on whether the FAA acted, in substantial part, under Chapter 20 in issuing the order, not on "the substantive claim[s] alleged in the complaint."

Sutton, 38 F.3d at 625; accord *National Parks*, 998 F.2d at 1528.

Section 46110(a), the judicial-review provision invoked here, and Section 1486(a), the judicial-review provision invoked in *Sutton* and *National Parks*, are substantively identical.[3] Both provisions authorize review in the court of appeals of an FAA order issued "under" the "Air Commerce and Safety" provisions of Title 49 on the petition of a "person disclosing a substantial interest in [that] order." Accordingly, the Ninth Circuit's decision in this case squarely conflicts with the decisions of the Second and Tenth Circuits in those earlier cases.

The Ninth Circuit's decision is also in tension with decisions of other circuits, which have held that, when a party challenges an FAA order on both Part A grounds and non-Part A grounds, review lies exclusively in the court of appeals. See *Suburban O'Hare Comm'n* v. *Dole*, 787 F.2d 186, 192-193 (7th Cir.), cert. denied, 479 U.S. 847 (1986); *City of Alexandria* v. *Helms*, 728 F.2d 643, 645 & n.2, 646 (4th Cir. 1984); *City of Rochester* v. *Bond*, 603 F.2d 927, 931 & nn. 11-13, 934-938 (D.C. Cir. 1979); cf. *Media Access Project* v. *FCC*, 883 F.2d 1063, 1067 (D.C. Cir. 1989) (discussing those cases). As the Seventh Circuit explained, "[w]hen an agency decision has two distinct bases, one of which provides for

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[3] The judicial-review provision previously found at 49 U.S.C. App. 1486 was codified at 49 U.S.C. 46110 as part of the 1994 codification of Title 49. See Act of July 5, 1994, Pub. L. No. 103-272, § 1(a), (e), 108 Stat. 745, 1230. Congress stated in the preamble to the Act that its intent was to "revise, codify, and enact *without substantive change* certain general and permanent laws, related to transportation." *Id.* Preamble, 108 Stat. 745 (emphasis added); accord H.R. Rep. No. 180, 103d Cong., 1st Sess. 5 (1993); see *id.* at 378-379 (discussing linguistic changes in Section 46110).

exclusive jurisdiction in the courts of appeals, the entire decision is reviewable exclusively in the appellate court." *Suburban O'Hare*, 787 F.2d at 192-193. That rationale encompasses cases, such as this one, in which an FAA order is challenged solely on grounds outside Part A. Cf. *City of Rochester*, 603 F.2d at 937 (noting "the irrelevance of the specific substantive ground" on which an FAA order is challenged for purposes of the judicial-review provision).

3. The court of appeals' decision undermines Congress's purpose in Section 46110 of expediting judicial review of orders issued by the FAA under Part A.[4] That purpose is reflected in Congress's choice to make such orders reviewable, in the first instance, exclusively in the court of appeals, see 49 U.S.C. 46110(c), and to require parties to seek review of such orders within 60 days of their issuance, see 49 U.S.C. 46110(a). See *To Create a Civil Aeronautics Authority: Hearings Before the House Comm. on Interstate and Foreign Commerce*, 75th Cong., 3d Sess. 46 (1938) (statement of Clinton M. Hester, Assistant General Counsel, Department of the Treasury) (observing that the predecessor to Section 46110 was designed "to eliminate the expense and delay of conducting litigation in the District Courts dealing with judicial review of administrative orders"); *City of Rochester*, 603 F.2d at 935 (observing that Section 46110(a)'s "timeliness requirement reflects a deliberate congressional choice to impose statutory finality on agency orders").

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[4] Section 46110 also applies to orders issued by the Secretary of Transportation and, with respect to aviation security matters, the Under Secretary of Transportation for Security. 49 U.S.C. 46110(a). Such orders involve determinations under Part A and may also raise issues under statutory provisions outside Part A.

If certain challenges to an FAA order issued, in part, under Part A could be initiated only in district court under the judicial-review provisions of the APA (because the FAA's exercise of authority under Part A is not contested), those challenges would not be subject to the 60-day limitation period of Section 46110(a). That would, as the D.C. Circuit has observed, "completely undo [the] act's requirement of a timely petition for review." *City of Rochester*, 603 F.2d at 935. It would also subject portions of the order to an additional level of judicial scrutiny, thereby "requiring duplication of the identical task in the district court and in the court of appeals," *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985), and potentially delaying the date on which the order as a whole would become final. Moreover, if one party challenged the order as inconsistent with the requirements of Part A, while another party challenged the order as inconsistent with the requirements of Part B or NEPA, the court of appeals and the district court could simultaneously be adjudicating the validity of the same order, producing "[t]he likelihood of duplication and inconsistency." *City of Rochester*, 603 F.2d at 936. As other circuits have recognized, "[t]he rationale for statutory review is that coherence and economy are best served if all suits pertaining to designated agency decisions are segregated in particular courts." *Sutton*, 38 F.3d at 625 (quoting *City of Rochester*, 603 F.2d at 936); accord *Suburban O'Hare*, 787 F.2d at 192; cf. *Florida Power*, 470 U.S. at 742 (noting the "seeming[] irrational[ity]" of a "bifurcated system" in which "some final orders in licensing proceedings receiv[e] two layers of judicial review and some receiv[e] only one").

The court of appeals' decision creates other inefficiencies as well with regard to the review of FAA orders.

Under the court of appeals' approach, jurisdiction would be determined *not* from the face of the order (*i.e.*, whether the order was issued, in part, under Part A), but from the arguments advanced by the petitioners in their briefs on the merits. (Typically, as here, the initial petition for review does not identify the particular portions of the order being challenged or the particular grounds of the challenge.) It thus might not be ascertained until after the briefing, or perhaps even the oral argument, whether the case belonged in the district court or the court of appeals.

In sum, the court of appeals' decision threatens to inject prolonged uncertainty into orders involving airport development and safety, with the prospect of increased cost, delay, and inconvenience to the public. The size of the Ninth Circuit in both area and population, with the consequent demand for commercial airport construction and expansion, renders the decision here particularly problematic. For these reasons, and because the court of appeals' jurisdictional ruling conflicts with decisions of other courts of appeals, review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.[5]

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

THOMAS L. SANSONETTI
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

BARBARA MCDOWELL
Assistant to the Solicitor General

JEFFREY BOSSERT CLARK
RONALD M. SPRITZER
Attorneys

KIRK K. VAN TINE
General Counsel

JAMES W. WHITLOW
Deputy Chief Counsel
Federal Aviation Administration

Department of Transportation

DECEMBER 2002

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[5] As noted above (at 5 n.2), as a result of a settlement entered into among the other parties to this case, the underlying case may soon be dismissed with prejudice, leaving no live controversy among the parties. In that event, the FAA expects to move this Court to vacate the judgment of the court of appeals, so that its jurisdictional ruling, which would then be unreviewable by this Court, would not affect future challenges to similar FAA orders. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-70169

CITY OF ALAMEDA; CITIZENS LEAGUE FOR AIRPORT SAFETY AND SERENITY; BERKELEY KEEP JETS OVER THE BAY, AN UNINCORPORATED ASSOCIATION, PETITIONERS

v.

FEDERAL AVIATION ADMINISTRATION; PORT OF OAKLAND; COMMISSIONERS, PORT OF OAKLAND, RESPONDENTS

Filed Apr. 4, 2002

ORDER

Before: Chief Judge SCHROEDER, Judges B. FLETCHER and KOZINSKI, Circuit Judges.

We conclude that we lack appellate jurisdiction under 49 U.S.C. § 46110(a). We direct that the appeal be removed from the argument calendar and that it be transferred to the United States District Court for

the Northern District of California, pursuant to 28 U.S.C.§ 1631.[1]

We grant the Airports Council International-North America's motion for leave to file as amicus a response to our March 18, 2002 order. The brief submitted is ordered filed.

Petitioners appeal directly from the Federal Aviation Administration's ("FAA's") "Finding of No Significant Impact and Record of Decision," ("ROD") issued December 21, 2000, containing a number of orders authorizing the proposed airport development plan to proceed. The ROD constituted a final decision of the Federal Aviation Administration. Both petitioners and respondents contend that the FAA's final decision is subject to direct review by the Court of Appeals pursuant to 49 U.S.C. § 46110(a). We disagree.

In the recently decided case, *City of Los Angeles v. F.A.A.*, 239 F.3d 1033, 1034 (9th Cir. 2001), petitioners, City of Los Angeles *et al.*, challenged a "Final Policy . . . issued by the [FAA]." The court stated that "[t]he principal issue is whether we have jurisdiction to hear this case as a direct appeal of the agency's action or whether the case must first be instituted in district court." *Id.* at 1034. The court, after examining the structure and language of the statute, determined that it lacked appellate jurisdiction, and transferred the case to district court. *Id.*

As the court discussed, Subtitle VII ("Aviation Programs") of Title 49, is divided into four "Parts": Part A—Air Commerce and Safety; Part B—Airport De-

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[1] Petitioners have requested that if we conclude we lack jurisdiction that we transfer to the district court rather than dismiss the action.

velopment and Noise; Part C—Financing; and Part D—Miscellaneous. 49 U.S.C. § 49101, *et seq.* As petitioners here, petitioners in *City of Los Angeles* relied upon the jurisdictional provision of § 46110(a), located in Part A—Air Commerce and Safety, that provides for direct review by the courts of appeals. *Id.*, 239 F.3d at 1035. Under Part A, "a person disclosing a substantial interest in an order issued . . . under this part may apply for review of the order by filing a petition for review in the . . . court of appeals." § 46110(a).

In *City of Los Angeles*, petitioners challenged a Final Policy of the FAA involving the receipt of federal Airport Improvement Program grants by various localities. In sum, the FAA in that case imposed a tighter restriction on the already established policy that all recipients must assure the Department of Transportation "that airport revenues would not be diverted to non-airport uses." *Id.* Petitioners sought review in our court of the regulatory action.

As the court discussed, though the jurisdictional provision relied upon by the petitioners, § 46110(a), was located in Part A, the revenue-use restrictions challenged by the petitioners were located in Part B, specifically at 49 U.S.C. §§ 47107(b) and 47133. Therefore, the court held, " § 46110(a) does not cover the Final Policy because it is not an order under Part A."[2] *Id.*, 239 F.3d at 1035 n.3. Further, "[e]very court of appeals case that could be found exercising jurisdiction under § 46110(a) involved airline commerce and safety or a specific provision under Part A." *Id.*, 239 F.3d at 1036 (citing cases). Cases *affirming* the exclusive juris-

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[2] The court noted that Part B contains its own judicial review provisions, none of which applied in that case. *Id.*

diction of the courts of appeals "indicate[ ] that § 46110(a) encompasses orders relating to air safety." *Id.* (citing, *e.g.*, *Foster v. Skinner*, 70 F.3d 1084, 1087 (9th Cir. 1995) (holding that claims regarding revocation of appellant's flight privileges for violating safety regulations were subject to court of appeals jurisdiction)).

Petitioners contend that *City of Los Angeles* is inapposite because the petitioners in that case challenged an FAA action wholly within Part B of Title 49 Subtitle VII, whereas in the case at bar the FAA's actions were taken pursuant to both sections A and B of Title 49 Subtitle VII. The FAA actions *challenged by petitioners here*, however, concern themselves with matters covered by Part B, Airport Development and Noise, rather than Part A, that concerns Air Commerce and Safety. Petitioners fail to disclose a "substantial interest" in an order issued under Part A. Unlike the cases relied upon by the parties in their submissions in response to our March 18, 2002 order, petitioners on appeal allege *only* violations of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.* The fact that the ROD refers to matters of Airport Safety and Commerce is of no import here, since petitioners challenge actions unrelated to either of those matters.[3] For that reason, as in *City of Los Angeles*,

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[3] Petitioners, on appeal, allege that the FAA violated NEPA by (1) failing to prepare an environmental impact statement, (2) failing to disclose significant environmental effects, (3) relying on unspecified mitigation measures in reaching its conclusions on environmental impact, and (4) failing to examine a reasonable range of alternatives to the proposed development. Petitioners *do not contend* that their concerns reach the areas of air commerce and safety—only that the FAA's "Finding of No Significant Im-

petitioners must bring their claims pursuant to some other statute.[4]

Because Congress chose to cabin the availability of direct appeal to the courts of appeals, limiting the scope of 49 U.S.C. § 46110(a), dividing Subtitle VII into four parts, and lodging this jurisdictional provision within Part A alone, it would contravene clear Congressional intent to allow petitioners to bring claims concerning Airport Development and Noise, regulated under Part B, under the jurisdictional provisions of Part A. As we noted in *City of Los Angeles*, the clear language and structure of 46110(a) "trumps any alleged contradictory understanding" of Congressional intent when it enacted the statute. *Id.*, 239 F.3d at 1036.

Appeal transferred to the district court.

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pact and Record of Decision" relies in part on the statutory provisions of Part A related to those matters.

[4] Such as NEPA, or the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.*, for example. By transferring this appeal, we do not purport to rule on the district court's jurisdiction. That is an issue for it to determine.

APPENDIX B

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WESTERN-PACIFIC REGION
HAWTHORNE, CALIFORNIA

FINDING OF NO SIGNIFICANT IMPACT AND RECORD OF DECISION

PROPOSED AIRPORT DEVELOPMENT PROGRAM

OAKLAND INTERNATIONAL AIRPORT
Oakland, California

December 21, 2000

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U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

FINDING OF NO SIGNIFICANT IMPACT
AND RECORD OF DECISION

PROPOSED AIRPORT DEVELOPMENT PROGRAM

OAKLAND INTERNATIONAL AIRPORT
OAKLAND, CALIFORNIA

I. INTRODUCTION

This document serves as a Finding of No Significant Impact and Record of the Decision of the Federal Aviation Administration (FAA) to approve the Airport Layout Plan depicting the various components of the Port of Oakland's proposed Airport Development Program (ADP) which includes the proposed Airport Roadway Project (ARP) at Oakland International Airport. This Finding of No Significant Impact (FONSI) and Record of the Decision (ROD) will describe the purpose and need of the project, the actions to be taken by the FAA, the alternatives examined in the Final Environmental Assessment (FEA), the environmental effects of the preferred alternative, committed mitigation, satisfaction of assurances and the decision action. The nature and extent of the decision is clearly stated in this FONSI/ROD, which is a decision document.

Oakland International Airport is an air carrier airport owned and operated by the Port of Oakland, California. The airport is located in the southwest corner of the city of Oakland in unincorporated Alameda County on the eastern side of San Francisco Bay. The airport is divided into two basic components (North Airport and South Airport). The Northern portion has three run-

ways, each with a parallel taxiway system. The Southern portion contains the main runway for the airport that also has a parallel and connecting taxiway system. The airport provides facilities that accommodate international and domestic commercial airlines, commuter airlines, airline support/maintenance, air freight, and general aviation facilities.

On December 29, 1992, FAA issued a Notice of Intent to prepare an Environmental Impact Statement (EIS), in the *Federal Register*. This action was performed pursuant Section 1501.7 and 1508.22 of the President's Council on Environmental Quality (CEQ) Regulations (Title 40, Code of Federal Regulations [CFR] Part 1500-1508), the implementing regulations of the National Environmental Policy Act of 1969, (NEPA). The EIS would address the potential environmental impacts of the proposed ADP. The Port of Oakland also issued a Notice of Preparation pursuant to the California Environmental Quality Act of 1970 (CEQA) to prepare an Environmental Impact Report (EIR) for the ADP. Both documents included the Airport Roadway Project in the proposed ADP development.

In accordance with CEQ Section 1506.2, the FAA, as the lead federal agency and the Port of Oakland, as the lead state agency, prepared a joint Draft EIS/EIR to reduce unnecessary duplication of federal and state environmental disclosure procedures. A joint Draft EIS/EIR was made available to the public on September 10, 1996. The U.S. Army Corps of Engineers is a cooperating agency in the preparation of the joint Draft EIS/EIR pursuant to CEQ Section 1501.6(a)(1). Public hearings were conducted on the joint draft document. Subsequent to the public hearing, the Port of Oakland determined that it needed to complete the CEQA portion of the joint document to meet the environ-

mental documentation needs of the Port of Oakland. Subsequent to the certification of the EIR portion of the document, the EIR was challenged in state court. The state court required that the Port of Oakland prepare supplemental CEQA analysis to support the EIR.

In September 1999, pursuant to paragraph 102 of FAA Order 5050.4A, *Airport Environmental Handbook*, the FAA prepared a Revised Draft EIS that updated, where appropriate, information in the 1996 Draft EIS. The FAA issued the Revised Draft EIS in September 2000. Both written and verbal comments were received during the public review period. The analysis of the various environmental impact categories required by FAA Order 5050.4A, revealed that the proposed action would not exceed the federal thresholds of significance, as defined in the Order. Therefore, considering the various consultation and document coordination efforts on the part of the FAA; the type and extent of the comments received from all parties including federal, state, and local governmental agencies, groups and interested citizens; and the analysis of impacts presented in the Revised Draft EIS; the FAA has determined that the appropriate level of federal environmental disclosure document for this project is an Environmental Assessment (EA). The FAA's determination that an EA is the appropriate federal environmental disclosure action is made by this FONSI and ROD.

II. PURPOSE AND NEED OF THE PROPOSED PROJECT

The purpose and need for the proposed improvements are documented in Chapter 2 of the FEA. The overall purpose and need of the proposed development is to safely and efficiently accommodate future growth in

aviation demand within the Oakland International Airport service area.

The purpose and need for the terminal improvements is to provide an adequate level of service to accommodate the existing and forecast increase in domestic and international passengers using Oakland International Airport. The existing facility is not adequate to maintain an acceptable level of service.

The project is described in detail in Section 2.1, ADP Alternative of the FEA. The federal action requiring review pursuant to the National Environmental Policy Act of 1969 (NEPA) is unconditional approval of the Airport Layout Plan (ALP) to depict the proposed projects to be implemented under the ADP [49 USC 47107(a)(16)]. The various projects to be implemented under the ADP are depicted on Figure 1.3 from the approved FEA, and are included on the following page. The following is a list of these various projects:

- Expand Passenger Terminal Facilities including 12 additional aircraft parking positions and passenger loading gates, new concourse, passenger hold rooms and baggage facilities.
- Construct the Airport Roadway Project (ARP), automobile parking garage, improvements to Airport Drive including double deck roadway of the Terminal Loop, and a crossover taxiway over the ARP.
- Relocate and expand existing automobile parking and rental car facilities.
- Expand the Airline Flight Kitchen facilities, and relocation of ground vehicle service facilities into a single site.
- Relocate jet fuel dispensing facilities.

- Expand the existing United Airlines maintenance base.
- Expand Air Cargo facilities including aircraft parking aprons and Multi-tenant cargo facility for sorting, offices and aircraft parking.
- Construct New North Airport cargo facilities including aircraft parking aprons, automobile/truck parking and a connecting infield roadway.
- Relocate existing T-hangars displaced by the proposed infield roadway.
- Construct up to 17 new remote aircraft parking positions (including replacement of aircraft parking positions eliminated by terminal expansion and cargo projects) in an area between Taxiway W and Taxiway T.
- Widen Taxiway W
- Widen Taxiway U to provide dual taxilanes.

[Illustration omitted]

III. THE PROPOSED AGENCY ACTIONS

The FAA's major Federal actions include the unconditional approval of an Airport Layout Plan (ALP) submitted by the Port of Oakland for Oakland International Airport that depicts the projects listed in Section II above.

The ALP, which depicts the various development items included in the Port of Oakland's ADP has been reviewed by the FAA to determine conformance with FAA design criteria and Federal grant agreements (refer to 14 CFR Parts 77 and 157). The FAA has reviewed the proposed development at Oakland Inter-

national Airport and has determined it is compatible with existing airspace utilization and procedures.

The specific FAA decisions and other actions involving the development proposed by the Port of Oakland at Oakland International Airport include the following:

1. Environmental approval of the project and the Final EA pursuant to 42 U.S.C. 4321 *et. seq.* and 40 CFR 1500 *et. seq.*

2. Unconditional approval of the ALP pursuant to Title 49, U.S.C. Section 47107(a)(16) for those projects in the Port of Oakland's ADP.

3. Eligibility of the projects for funding under the Federal grant-in-aid program authorized by the Airport and Airway Improvement Act of 1982, as amended (recodified at Title 49 U.S.C. Section 47107) and/or eligibility of the project for Passenger Facility Charges.

4. Prior to any funding decision, a determination must be made under 49 U.S.C. 44502(b) of reasonable necessity for use in air commerce or in the interests of national defense.

5. Approval of the appropriate amendments to the airport certification manual pursuant to Title 14, Code of Federal Regulations (CFR), Part 139 and modification, as required, to the airport security plan pursuant to 14 CFR Part 107 (49 U.S.C. 44706).

6. Continued close coordination with the Port of Oakland and appropriate FAA program offices, as required, to maintain safety during construction pursuant to 14 CFR Part 139 (49 U.S.C. 44706).

7. Determination of effects upon the safe and efficient utilization of navigable airspace pursuant to 14 CFR Parts 77 and 157.

The Airport Development Project (ADP), including the Airport Roadway Project, airfield improvements, expanded terminal buildings, air cargo facilities and associated automobile parking facilities are necessary to provide an adequate level of service. This project is part of the National Plan of Integrated Airport Systems (NPIAS) which is planned to provide public airport facilities conforming to minimum design standards.

IV. ALTERNATIVES ANALYSIS

The Alternatives Analysis in Chapter 3 of the FEA identifies the reasonable range of alternatives to the proposed project, as required by Title 40 CFR 1502.14. The overall alternatives analysis consisted of a two level analysis. The first level evaluated a wide range of general alternatives. The second level of analysis more closely evaluated those alternatives, including the No Action Alternative. These alternatives were determined under the first level to have the potential to be a feasible and prudent solution to the problem of severe congestion in the passenger terminal complex including automobile parking and ground access (Airport Roadway Project). The first level of analysis evaluates each alternative in terms of its ability to satisfy the purpose and need of the proposed project and the alternative's potential for significant environmental impacts. In the FEA, the FAA analyzed 12 alternatives including both on-airport and off-airport alternatives and the No Action Alternative, as required by Title 40 CFR 1502.14(d) and FAA Order 5050.4A, *Airport Environmental Handbook*. The FEA contains a detailed

discussion of each of these alternatives in Chapter 3, *Alternatives*. The 12 alternatives are:

1. Regional Alternative–Additional Air Carrier Runway in the Bay at Oakland International Airport.

2. New Bay Area Air Carrier Airport Site.

3. Civilian Reuse or Shared use of Military Airfields.

4. Alternative Technologies.

5. High Speed Rail Service in the California Corridor.

6. Other Modes of Transport.

7. Civilian Tiltrotor and Vertiports.

8. Telecommunications and Telecommuting.

9. City of Alameda Proposed Settlement Agreement.

10. Reduced Intensity Development Alternative.

11. The Airport Development Program.

12. No Action Alternative.

Through the alternatives analysis, the first ten alternatives were eliminated from further consideration. The text of the FEA that describes why these alternatives were eliminated is contained in Section 3.1 and 3.2. For various reasons, as described in the FEA, these alternatives did not meet the purpose and need. The primary need is to reduce existing congestion by expanding the passenger terminal facilities, automobile parking,

airport access (Airport Roadway Project), and air cargo facilities. Section 3.2 of the FEA describes both alternatives that were retained by the FAA for further consideration in the second level of analysis. The FAA determined that the Proposed Action – The Port of Oakland's ADP, was the only alternative that would reasonably fulfill the purpose and need for the proposed action.

Section 3.2.1 of the FEA clearly identifies the Port of Oakland's ADP as their preferred alternative. The FAA has determined, in this FONSI and ROD, that the ADP is the FAA's preferred alternative. The No Action Alternative would not fulfill the purpose and need for the proposed actions. This alternative would also create negative environmental impacts since the airport efficiency would not be improved consequently, on-airport delays and roadway congestion would continue to increase.

The following is a brief description of the general project alternatives that was retained for further consideration:

Port of Oakland's Proposed ADP Alternative: This alternative consists of implementing the Port of Oakland's proposed ADP that includes the Airport Roadway Project. This alternative includes demolition, construction and replacement of various facilities in the vicinity of the existing passenger terminal complex. The primary feature of this alternative is the construction of up to 17 new aircraft parking positions and gates at the terminal building, construction of automobile parking improvements, construction of additional air cargo facilities, construction of various taxiway and aircraft parking apron improvements. The ADP alternative does **not** include any changes to the

existing runway system. The Port of Oakland has clearly stated to the FAA that they have no plans to construct a new runway until sometime after the year 2010 (see Section 3.0 of the FEA). Therefore, the existing system with the same runway usage patterns was evaluated for both the ADP and No-Action alternatives.

No Action Alternative: This alternative consists of not implementing any of the ADP development including the Airport Roadway Project. No new development items identified in the ADP including the Airport Roadway Project would be constructed or implemented.

CONCLUSION

Based on the information disclosed through the 1996 joint Draft EIS/EIR, the 2000 Revised Draft EIS and the 2000 FEA, the FAA has determined that the proposed ADP Alternative demonstrated the best ability to meet the purpose and need of the project with the least adverse environmental impact. The ADP, with mitigation, results in no significant adverse impacts, whereas the No Action alternative would have potentially significant adverse impacts in several categories, including noise and air quality. See, Table 1.2 of the EA. Therefore, the ADP Alternative, which includes the Airport Roadway Project, has been determined by the FAA, in this FONSI and ROD, to be the FAA's environmentally preferred alternative as well as the FAA's preferred alternative. This alternative directly supports the essential and most urgent facility needs at Oakland International Airport with the least adverse environmental effects. In arriving at this decision, the FAA considered all pertinent factors including the environmental impact as well as the FAA statutory charter in the Federal Aviation Act of 1958,

as amended to assure safe and efficient use of navigable airspace (49 U.S.C. 40103). Based on the information disclosed in the FEA, the FAA has determined that the Proposed ADP Alternative demonstrated the best ability to meet both the purpose and need of relieving the existing congestion in and around the passenger terminal including automobile access, and limited air cargo facilities, while continuing to accommodate air carrier and air cargo activity and create the least adverse environmental impacts.

V. ENVIRONMENTAL CONSEQUENCES AND MITIGATION

The impacts of the ADP and the No Action Alternative are summarized below. Detailed discussions for each environmental impact category are contained in the FEA in Section 4. In this FONSI and ROD each impact category studied is listed with a brief discussion of the results of the impact analysis, and, if necessary, any mitigation measures. Cumulative impacts are addressed in Section 4.24 of the FEA.

The FAA will monitor the implementation of mitigation actions, as necessary, to assure that representations made in the FEA and this FONSI and ROD are carried out in accordance with the FAA's statutory authority. Practical means to avoid or minimize environmental harm are summarized below in each environmental impact category, as appropriate.

The FEA was prepared as a federal document. In 1992, the Port of Oakland prepared an Environmental Impact Report pursuant to the California Environmental Quality Act of 1970 (CEQA). The FEA has satisfied the FAA guidelines identified in FAA Order 5050.4A, *Airport Environmental Handbook*, and FAA Order 1050.1D, *Policies and Procedures for Considering En-*

vironmental Impacts, for the preparation of an Environmental Assessment. The FEA has been independently reviewed by the FAA and found to be adequate for the purpose of the proposed Federal action. The following is a summary of the various environmental impact categories required by FAA Order 5050.4A.

NOISE. The FEA documents the ADP improvement's impact on the surrounding community in Section 4.1. As stated in Section IV of this FONSI and ROD, the ADP alternative does not include any changes to the existing runway system. Therefore, the existing system with the same runway usage patterns was evaluated for both the ADP and No-Action alternative. Both the ADP Alternative and the No Action Alternative result in noise contours that are smaller in size than the existing condition. The reduction of the overall size of the noise contours is due largely to the completion of the phase out of the noisier Stage 2 aircraft weighing over 75,000 pounds that occurred at the end of 1999. This phase out was required by the Airport Noise and Capacity Act of 1990 and is implemented by Federal Aviation Regulation Part 91, Subpart I. The noise contours for the future year 2010 are virtually identical for both alternatives. Noise levels would not exceed FAA's threshold of significance of 1.5 CNEL increase over noise sensitive land uses within the 65-CNEL noise contour. The FEA notes that there are a number of noise sensitive land uses located within the 65 CNEL noise contour. The Port of Oakland holds avigation easements on 65 of the 97 homes that would be located within the 65 CNEL contour for the year 2005. As stated in Section 4.1.2 of the FEA, these homes are located on Bay Farm Island immediately adjacent to the airport.

The FEA notes that the noise abatement and mitigation measures developed in the Port of Oakland's Noise

Compatibility Program are expected to mitigate existing and future noise impacts from airport operations in the area. The Noise Compatibility Program was prepared pursuant to 14 CFR Part 150, the implementing regulations for the Airport Safety and Noise Abatement Act of 1979, as amended. The FAA approved the Port of Oakland's Noise Compatibility Program on May 21, 1991. These measures have been incorporated into the ADP Alternative.

COMPATIBLE LAND USE. The ADP improvements including the new international passenger terminal project are consistent with the various local and regional plans of the surrounding communities as described in Sections 4.2 of the FEA. The Port of Oakland provided the required land use assurance letter to the FAA, which is included in Appendix D of the FEA. No mitigation for this environmental impact is necessary.

SOCIAL IMPACTS. The principal social impact anticipated by the ADP concerns surface traffic patterns. The ADP includes the construction of an Airport Roadway Project that will provide additional surface access to Bay Farm Island through the central portion of the airport. The associated roadways connecting the Airport Roadway Project to I-880 will help to alleviate existing congestion and further reduce congestion resulting from forecast passenger levels.

Section 4.3.2 of the FEA anticipates that the Airport Roadway Project will displace two residential units and require relocation of eight individuals. It would also require relocation of two businesses and compensation for structures belonging to another business. All relocations shall be accomplished in accordance with the Uniform Relocation and Assistance and Real Property Acquisition Policies Act of 1970 (The Uniform Act).

According to FEA, one of the residences is already owned by the City and the two occupants have been relocated. However, the FAA is in possession of current information from the Port that both households, identified in the FEA as subject to relocation as a result of the ADP, have been relocated per the Port's mitigation program, which incorporates all applicable legal requirements and supports the assurances required by Order 5050.4A. Under the No Action Alternative the ADP, improvements would not be implemented. Consequently, the Level of Service (LOS) of the various roadways would continue to deteriorate as the demand for airport services at Oakland International Airport increases.

This topic also evaluates Environmental Justice as prescribed by Executive Order 12898. Federal agencies must identify and address disproportionately high and adverse effects of their programs, policies, and other actions on minority or low-income populations. To achieve this, Executive Order 12898 directs each federal agency to make achieving environmental justice part of its mission. To that end, U.S. Department of Transportation Order 5610.2, *Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, was used to prepare the analysis in this portion of the FEA. The displacement of two residences has involved eight individuals in a minority community as described above. Segments 5 and 6 of the Airport Roadway Project are located within a minority community that is composed of more than a 50 percent minority population. In addition, the proposed Airport Roadway Project includes the installation of a noise barrier to reduce the impacts of roadway noise on the community. As relocation has been accomplished in accordance with the Uniform Act and a roadway noise barrier will be constructed to

avoid potentially significant noise increases in the affected communities, the FAA has determined that the proposed ADP including the Airport Roadway Project will not have disproportionately high and adverse human health and environmental effects on minority and low-income populations.

INDUCED SOCIOECONOMIC IMPACTS. Since the majority of the ADP Alternative, (with the exception of portions of the Airport Roadway Project), is contained within the existing boundaries of the airport, the proposal is not expected to alter the patterns of population movement and growth. Neither the ADP Alternative nor the No Action Alternative is expected to have or create significant impacts regarding noise, land use and the need for various social services such as hospitals, schools, etc. No mitigation for this impact category is necessary.

AIR QUALITY. Section 4.5 of the FEA states that the air emissions associated with the airport are expected to increase due to the forecast increase in aircraft operations for either the ADP Alternative or the No Action Alternative. Implementation of the ADP Alternative would cause construction emissions to occur that would not be present in the No Action Alternative. Emissions will also be reduced by the incorporation of central power and preconditioned air at all concourse aircraft gates at the airport.

Section 4.5.3 of the FEA describes the air quality impacts including the need for an air quality conformity determination pursuant to Section 176(c) of the Clean Air Act Amendments of 1990. The analysis presented in Section 4.5.3 and Tables 4.5-7, and 4.5-15, of the FEA clearly shows that air emissions associated with construction and operation of the ADP Alternative are

below the *de minimis* levels. Pursuant to 40 CFR Section 51.853, project emissions that have been demonstrated to be below de minimis levels are presumed to conform to the State Implementation Plan. The roadway portions of the ADP, including the Airport Roadway Project, are included in the Metropolitan Transportation Commission's 1999 Transportation Improvement Program (TIP). The Regional TIP was found in conformance with the State Implementation Plan. Consequently, a conformity determination pursuant to Section 176(c) of the Clean Air Act is **not** required.

Since the ADP Alternative does not include construction of a new runway or major runway extension, a certification of reasonable assurance for air quality impacts from the California Air Resources Board pursuant to the Airport and Airway Improvement Act of 1982, as amended (49 U.S.C. 47106) is **not** required.

WATER QUALITY. The ADP project is not expected to have a significant impact on water quality in the area. Section 4.6.2 of the FEA describes the potential impacts to water quality by the No-Action Alternative and the ADP Alternative. Increased surface water runoff is expected due to construction of additional pavement. The Port of Oakland maintains a Regional Stormwater Pollution Prevention Plan in compliance with their General National Pollution Discharge Elimination System. Waste water from airport terminals and aircraft washing are treated through a sanitary sewer system.

Since the project does not include construction of a new airport, new runway, or major runway extension, a water quality certification letter from the California Regional Water Quality Control Board, pursuant to the

Airport and Airway Improvement Act of 1982, as amended (49 U.S.C. 47106) is **not** required.

DEPARTMENT OF TRANSPORTATION, SECTION 4(F) LANDS. Section 4.7.2 of the FEA states that no lands protected by Section 4(f) of the Department of Transportation Act of 1966, as amended, would be physically used by the ADP projects at Oakland International Airport. The FEA notes that any increase in noise exposure levels at all properties protected under Section 4(f) will not exceed 1.5 dB CNEL. Therefore, neither the ADP improvements nor the No-Action Alternative would result in constructive use of Section 4(f) properties. Consequently, no direct use or constructive use of these properties would occur. No mitigation measures for this environmental impact category are necessary. As stated above in the discussion about airport noise, the Port of Oakland will continue to implement the FAA approved noise mitigation and abatement program prepared pursuant to Federal Aviation Regulation Part 150.

HISTORIC AND ARCHAEOLOGICAL RESOURCES. Section 4.8 of the FEA states that no structures located within the Area of Potential Effect which are listed or are eligible for listing on the National Register of Historic Places. The FAA conducted consultation with the State Historic Preservation Officer (SHPO) pursuant to Section 106 of the National Historic Preservation Act of 1966. The FAA determined that there are no properties listed or eligible for listing on the National Register of Historic Places. The ADP Project will not affect any properties listed or eligible for listing on the Register within the Area of Potential Effect pursuant to 36 CFR Part 800. No specific mitigation for this environmental impact category is necessary. The SHPO has concurred with the FAA's determination of

no effect by letter dated October 30, 1995. See Appendix J of the FEA.

BIOTIC COMMUNITIES. The FEA states in Section 4.9, that the proposed ADP improvements would increase the paved areas of the airport by up to 189 acres. Increased aircraft operations under both the No Action Alternative and the ADP Alternative have the potential for increased bird strikes. The primary impact to biotic communities is the impact to common wildlife. The proposed widening of the San Leandro Bridge at 98th Avenue will involve streambed excavation and backfilling in the San Leandro Creek. This creek historically supported a population of Central California coast steelhead trout, a federally listed endangered species. However, the historic run of the steelhead is landlocked upstream by the Lake Chabot dam. Mitigation to minimize the potential impacts to any steelhead at the San Leandro Bridge is described in Section 4.9.2 of the FEA. The principal mitigation is to avoid impacts to the steelhead by conducting construction activities between June 1 and October 31. The other species of concern is the state-listed burrowing owl. The FEA notes that burrowing owls have been observed on Oakland International Airport in both the North and South Airports. Section 4.9.2 of the FEA also includes detailed mitigation measures to minimize the adverse impacts to the burrowing owls. The burrowing owl is not federally listed as threatened or endangered.

ENDANGERED AND THREATENED SPECIES OF FLORA AND FAUNA. Section 4.9 of the FEA includes a detailed listing of the various special-status species and common species that are present or likely to be present at Oakland International Airport and whether or not the proposed ADP and the No Action Alternative would

affect these species. A biological assessment was prepared by a qualified biologist for Oakland International Airport in 1995. Under the no-action alternative, no construction or site modification actions would occur. The FAA has determined that the proposed ADP will **not** affect any federally listed threatened or endangered species of flora and fauna. The U.S. Fish and Wildlife Service (USFWS) has concurred with the FAA's determination, dated June 30, 1997 (See Appendix D of the FEA). The FAA also conducted consultation with the National Marine Fisheries Service pursuant to Section 7 of the Endangered Species Act of 1973 for the proposed ADP.

The USFWS reaffirmed its position regarding the impacts to federally listed species to the FAA in a letter dated December 8, 2000.

WETLANDS. The impacts to wetlands and/or waters of the United States are described in Section 4.11 of the FEA. Under the No-Action Alternative, no construction activities would occur. Consequently, no direct effects to wetlands would occur. The ADP Alternative will impact 7.76 acres of wetlands and other waters of the U.S. that would be filled to accommodate the proposed ADP. Section 4.11.2 of the FEA indicates that the proposed ADP will also affect approximately 63 acres regulated by Section 10 Rivers and Harbors Act. The FEA notes that most of the Section 10 areas are internal to the dikes that protect the airport and are now functionally ruderal lowland habitats with no wetland features. Table 4.11.2 in the FEA identifies the acreage of wetlands and waters of the U.S. affected by the proposed ADP. The bulk of the wetland acreage affected by the proposed action is caused by the Airport Roadway Project. The FEA identifies that the Port of Oakland has committed to recreate approximately 19.94

acres of wetlands as mitigation for those wetlands lost to the proposed project.

The wetlands replacement is to be accomplished at a ratio of 2.34 to 1. To ensure that airport safety will be maintained, no new wetlands will be constructed in the Runway Protection Zones. The FEA notes that three sites have been identified for suitable wetlands restoration. One site is located at Oro Loma Marsh, approximately two miles from the airport. The second site is located at the end of Edgewater Drive, south of Damon Slough, northeast of the airport. The third site is located on North Airport adjacent to Fan Marsh, which was diked and drained in 1933.

The U.S. Army Corps of Engineers, as a cooperating agency has issued its own Finding of No Significant Impact for the proposed project (ADP) as it relates to their regulation of impacts to waters of the United States.

FLOODPLAINS. Figure 4.12.2 in Section 4.12 of the FEA illustrates the location of the 100-year floodplain and Flood Hazard Zones on Oakland International Airport. The majority of the ADP improvements are located at the passenger terminal building area, outside of the 100-year floodplain. Several minor projects of the ADP are located within the 100-year floodplain on the northern portion of the airport. These encroachments occur as a result of the construction of Segment 6 of the Airport Roadway Project and the widening of the existing bridge over San Leandro Creek at 98th Avenue. Subsequent to the joint Draft EIS/EIR, preliminary designs and specifications for the proposed bridge expansion were discussed by the Port of Oakland with the Alameda County Flood Control District. The FEA concludes that the bridge expansion

would not substantially reduce or otherwise impair floodplain storage capacity, flood conveyance or other natural and beneficial floodplain resource values. The FEA notes that these projects are considered to be encroachments to the floodplain.

However, in accordance with paragraph 47(e)(12)(e) of FAA Order 5050.4A, *Airport Environmental Handbook*, the FAA has determined that this encroachment does not meet the definition of a "significant encroachment" described in U.S. Department of Transportation Order 5650.2, *Floodplain Management and Protection.* A significant encroachment involves the following three criteria: (1) A considerable probability of loss of human life; (2) Likely future damage associated with the encroachment that could be substantial in cost or extent including the interruption of service on or loss of a vital transportation facility; and (3) A notable adverse impact on natural and beneficial floodplain values. The proposed ADP includes projects such as the Airport Roadway Project. The ADP Alternative includes the creation of additional impervious surfaces and is not likely to raise the 100-year floodplain. The airport is adjacent to a highly urbanized locale. It was constructed in an area that was formerly open bay waters and regularly inundated mud flats. No mitigation for this environmental impact category is necessary.

COASTAL ZONE MANAGEMENT AND COASTAL BARRIERS. The Bay Conservation and Development Commission (BCDC) is the agency responsible for implementing the provision of the Coastal Zone Management Act for the State of California. BCDC jurisdiction in the proposed project area extends along San Francisco Bay to the line of mean high tide and over a 100-foot shoreline band inland from the mean high tide. The BCDC has issued a letter to the Port of Oakland,

dated March 12, 2000, indicating that the proposed project is consistent with the Coastal Zone Management Plan. This letter is shown on Page D-48 of Appendix D of the FEA.

The Coastal Barriers Resources Act refers to undeveloped coastal barriers along the Atlantic and Gulf Coasts. The proposed project does not create an impact to this geographic area resource. No mitigation for this environmental impact category is necessary.

WILD AND SCENIC RIVERS. There are no rivers or segments of rivers or streams that are categorized as wild and scenic that would be affected by the proposed project as described in the FEA in Section 4.14. The nearest "wild and scenic" river is a segment of the American River located approximately 60 miles northeast of the airport. No mitigation for this environmental impact category is necessary.

FARMLAND. Section 4.15 of the FEA states that construction of Segment 6 of the Airport Roadway Project, as part of the widening of 98th Avenue would eliminate approximately 0.3 acres of farmland now in active cultivation. As stated in Section 4.15.1 of the FEA, this farmland is not prime farmland. Further, this land is committed to urban development as shown on Figure 4.2.4 of the Final EA. Therefore, this land is not protected by the Farmland Protection Policy Act. Consequently, the proposed project will not result in a loss of active production farmland protected by the Farmland Protection Policy Act. No mitigation for this environmental impact category is necessary.

ENERGY SUPPLY AND NATURAL RESOURCES. Both alternatives would result in increased use of fuel and energy due to increased demand for air transportation

services. The use of central power and preconditioned air at all of the aircraft gates at the airport will reduce the overall amount of jet fuel needed by reducing the time needed for on-board and stand alone auxiliary power units. No specific mitigation for this environmental impact category is necessary. However, Section 4.16 of the FEA states that the Port of Oakland will take the appropriate steps to integrate energy efficient measures such as advanced heating, ventilation and air conditioning systems to meet current Federal and State energy codes.

LIGHT EMISSIONS. The Section 4.18 of the FEA states both the No Action Alternative and the ADP Alternative will introduce additional lighting emissions at the airport. This will consist of additional stationary lighting for the interior and exterior of proposed structures, security, parking lots, and the aircraft parking apron. The ADP Alternative would result in some additional lighting emissions that would not occur under the No Action Alternative due to new or expanded buildings and lighting along the Airport Roadway Project. These additional light emissions from the ADP Alternative are not considered significant. While the additional light emissions do not create a significant impact, as stated in the FEA, the Port of Oakland has included a variety of mitigation measures to reduce any light emission impacts on light sensitive uses in the vicinity of the airport.

SOLID WASTE IMPACT. The No Action Alternative and Proposed ADP Alternative would generate solid waste at the Airport. Construction activities would result in a temporary increase in construction related solid waste. Solid waste from the airport is disposed of at a landfill in Fremont, California and at the Altamount Landfill located approximately 35 miles south-

east of the airport. Section 4.19.1 of the FEA states that for the purposes of solid waste, the Oakland International Airport, is considered part of the city of Oakland. Therefore, the airport is subject to the provisions of California Assembly Bill 939 which requires that California communities divert 50 percent of all solid waste from landfills by the year 2000. Section 4.19.2 of the FEA indicates that no additional specific mitigation measures are necessary for this impact category since the Altamount Landfill operating period extends to the year 2028.

CONSTRUCTION IMPACTS. Construction related impacts are short term and include the increased potential for soil erosion and fugitive dust emissions. The majority of construction impacts relate to the air quality emissions due to construction activities involving earth moving. Construction related impacts also include the increased potential for soil erosion, increased air emissions, water quality degradation, and noise disturbance. These impacts would be temporary and intermittent in nature, and are minimized through environmental controls.

All on-site construction activities would be conducted according to FAA Advisory Circular 150/5370-10A "Standards for Specifying Construction of Airports" and use of Best Management Practices. Use of these measures would prevent or minimize any significant construction-related impacts to the environment and surrounding community.

Section 4.5 of the FEA describes the various mitigation measures to be used for the proposed ADP Alternative that will reduce fugitive dust emissions into the atmosphere. The No Action Alternative would not re-

sult in any construction related activities as described in the Port of Oakland's ADP.

HAZARDOUS MATERIALS. While not specifically required as an environmental impact category by FAA Order 5050.4A for an EA or an EIS, this topic has been included as part of the FEA in response to scoping comments on the Joint Draft EIS/EIR. Several areas on the Airport are known, or have the potential, to contain hazardous wastes, primarily petroleum products.

With increased aviation activity, the storage and handling of relatively small quantities of hazardous materials, not including aviation fuel, and the generation of small quantities of hazardous waste will increase. Given that the projected increases in large aircraft operations would be equivalent under the Proposed ADP and the No Action Alternative, it is reasonable to expect that the number of accidental spills during refueling operations would also increase. The continuing implementation of existing preventative fuel handling procedures and spill response procedures ensure that this impact would not pose a hazard nor be significant at the airport.

Several project components of the Proposed ADP Alternative would increase use and storage of hazardous materials other than aviation fuels, such as materials typical of facility maintenance: paints, solvents, oils and others. There also would be an indirect increase in the amount of hazardous waste generated at the Airport resulting from paint thinner and solvents primarily associated with expanded airport facilities. Waste would continue to be handled in accordance with methods currently used at the airport. An increase in the quantity of waste generated under the Proposed ADP and the No Action Alterna-

tive would not alter these conditions and, therefore, would not constitute a significant impact.

DESIGN, ART, AND ARCHITECTURE: This topic is normally included in a federal EIS prepared pursuant to FAA Order 5050.4A. In order to ensure continuity between documents, this topic was presented in the Revised Draft EIS and in the FEA. The Proposed ADP includes passenger terminal facility expansion including the terminal building and construction of increased automobile parking facilities. The proposed expansion and associated new structures would be designed to be compatible with the existing facilities and airport environs. Under the No Action Alternative, no terminal building expansion would occur, and effects related to design would not require consideration. Under the Proposed ADP, the construction of any additions to the terminal building and associated structures would be in accordance with local design codes and regulations, and the architectural integrity of the facilities would be designed to compliment existing Airport facilities. Therefore, no significant design impacts would occur for the Proposed ADP.

OTHER ENVIRONMENTAL IMPACT CATEGORIES. The FEA includes several environmental impact categories that are normally topics discussed in Environmental Impact Reports prepared pursuant to the California Environmental Quality Act of 1970 (CEQA). Information from the following topics of Transportation and Circulation, Geology and Seismology, and Public Services and Utilities were carried over from the joint Draft EIS/EIR, the Revised Draft EIS into the FEA. This was done for the purposes of continuity of review by persons who had previously reviewed the draft documents. While not normally included in federal environmental documents prepared by the FAA these

specific topics were retained in order to disclose the information that had been included.

VI. AGENCY FINDINGS

In accordance with the guidelines described in Paragraph 94 of FAA Order 5050.4A, *Airport Environmental Handbook*, the FAA has made the following determinations for the proposed project based upon appropriate evidence set forth in the administrative record required by the Airport and Airway Improvement Act of 1982, as amended.

A. Reasons for the Determination that the Proposed Action will have No Significant Impacts.
The Environmental Assessment referenced herein examines each of the potential impact areas. The proposed development described as the ADP including the expanded terminal buildings would not involve any impacts which would exceed the threshold of significance in FAA Order 5050.4A, *Airport Environmental Handbook.*

B. The project is reasonably consistent with existing plans of public agencies for development of the area [49 U.S.C. 47106]. The proposed project has been developed in coordination with various public agencies. Appropriate action has been or will be taken to restrict, to the extent possible, the use of land in the vicinity of the airport to purposes compatible with airport operations. The Port of Oakland, during the preparation of the EA expressed its intent to diligently pursue the compatibility of land uses around the airport. The Port of Oakland has also provided the required written land use assurance letter to the FAA that is included in Volume 2, Appendix K of the FEA.

C. Fair consideration has been given to the interests of communities in or near the project location [49 U.S.C. 47106(b)(2)]. Throughout the planning process many individuals, officials, agencies and organizations have been consulted, or have participated in activities that have contributed to the preparation of the FEA. A discussion of public involvement in this process is contained in Chapter 7 of the FEA.

D. Appropriate air and water quality certificates have been or will be secured for projects involving airport location, runway location, or a major runway extension [49 U.S.C. 47106]. The various projects that make up the ADP do **not** require certification from the Governor's office since they do **not** involve construction of a new airport, new runway or major runway extension pursuant to the Airport and Airway Improvement Act of 1982, as amended. The Port of Oakland has secured and maintains a National Pollution Discharge Elimination System (NPDES) permit through the State of California for storm water runoff.

E. The proposed action does not involve the use of lands subject to Section 4(f) of the Department of Transportation Act. There are no lands subject to protection by DOT Act, Section 4(f) that would be used, either actually and physically or constructively, by the ADP development at Oakland International Airport.

F. Any actions that involve the displacement and relocation of people. The ADP improvements, specifically the Airport Roadway Project, requires the acquisition and subsequent relocation of two residences. The FAA is in possession of current information from the Port that both households identified in the FEA as subject to relocation as a result of the ADP, rather than one household as stated in the Final EA, have been relocated per the Port's mitigation program, which

incorporates all applicable legal requirements and supports the assurances required by Order 5050.4A. The relocation of the [*sic*] these residents and the various businesses on the airport has been accomplished in accordance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. Adequate relocation housing within the financial means of these individuals was available.

G. Any actions that involve new construction affecting wetlands. Approximately 7.76 acres of wetlands and waters of the U.S. will be affected by the proposed ADP improvements. The Port of Oakland will obtain the necessary permits from the U.S. Army Corps of Engineers. The U.S. Army Corps of Engineers is a cooperating agency in the preparation of this FEA. The Corps has issued their own separate Finding of No Significant Impact for the proposed ADP as it relates to impacts to wetlands and waters of the United States.

H. Any actions that encroach on a floodplain. The FEA identified that a portion of the ADP improvements, located along the Airport Roadway Project will create an encroachment into the 100-year floodplain. However, in accordance with paragraph 47(e)(12)(e) of FAA Order 5050.4A, *Airport Environmental Handbook*, the FAA has determined that this encroachment does **not** meet the definition of a "significant encroachment" described in Department of Transportation Order 5650.2, *Floodplain Management and Protection*. A significant encroachment involves the following three criteria: (1) a considerable probability of loss of human life; (2) Likely future damage associated with the encroachment that could be substantial in cost or extent including the interruption of service on or loss of a vital transportation facility; and (3) A notable adverse impact on natural and beneficial floodplain values.

I. The FAA has given this proposal the independent and objective evaluation required by the Council on Environmental Quality [40 CFR 1506.5]. As described in the FEA, the ADP and the No Action Alternatives were studied extensively to determine the potential assessed impacts and the environmentally preferred project.

J. The air emissions resulting from the proposed project have been determined by the FAA to be "de minimis" and is therefore, presumed to conform with the State Implementation Plan for air quality pursuant to Section 176 (c) (1)(a) and (b) of the Federal Clean Air Act as amended in 1990. As described in the FEA, neither the ADP Alternative nor the No Action Alternative will induce additional aircraft activity to occur at Oakland International Airport. The air emissions related to this project have been analyzed and have been determined to be below the *de minimis* levels described in 40 CFR Part 51.853 and Part 93.153 and are presumed to conform with the State Implementation Plan.

VII. DECISIONS AND ORDERS

In the FEA and this FONSI and ROD, the FAA has identified the ADP as the FAA's "preferred alternative." FAA must now select one of the following choices:

- Approve agency actions necessary to implement the proposed project, or
- Disapprove agency actions to implement the proposed project.

Approval would signify that applicable federal requirements relating to airport development and planning have been met. Approval would also permit the Port of Oakland to implement the proposed eligible develop-

ment using federal funds. Not approving these agency actions would prevent the Port of Oakland from proceeding with implementation of the ADP with federal assistance in the form of Airport Improvement Program funds and/or a Passenger Facility Charge. It is important to note that as of the date of this FONSI and ROD, the Port of Oakland has not applied for federal financial assistance or a Passenger Facility Charge to implement the ADP, the preferred alternative.

Decision: I have carefully considered the FAA's goals and objectives in relation to the various aeronautical aspects of the proposed ADP improvements at Oakland International Airport as discussed in the FEA. The review included the purpose and needs to be served by this project. The review included alternative means of achieving the purpose and need, the environmental impacts of these alternatives, the mitigation necessary to preserve and enhance the human environment, and the costs and benefits of achieving these purposes and needs. In addition, the review also considered the proposed ADP in terms of an effective and fiscally responsible expenditure of local funds, and for eligible projects, federal funds, at such time as the Port of Oakland applies for federal grant-in-aid assistance or for use of Passenger Facility Charge funds.

Under the authority delegated to me by the Administrator of the Federal Aviation Administration, I find that the project is reasonably supported. Approval of the ALP is based on determinations through aeronautical studies conducted regarding potential obstructions to navigable airspace, and that the airport development proposal is acceptable from an airspace perspective. I, therefore, direct that action be taken to carry out the following agency actions discussed more fully in the Purpose and Need section of this FONSI/ROD:

A. Environmental approval of the project pursuant to 42 U.S.C. 4321 *et. seq.* and 40 CFR 1500 *et. sèq.*

B. Unconditional approval, pursuant to 49 U.S.C. 47107(a)(16) and 40103(b), of the Airport Layout Plan, submitted by the Port of Oakland for the Oakland International Airport depicting the proposed development in the ADP.

C. Approval to proceed with processing funds for those eligible airport development projects described as the Proposed Project, under the 49 U.S.C, Part B (formerly the Airport and Airway Improvement Act of 1982) described within the FEA and this FONSI and ROD. The FEA will satisfy the environmental documentation needs for the collection and use of a Passenger Facility Charge application, at such time as an application is submitted by the Port of Oakland and processed pursuant to Federal Aviation Regulation Part 158 for those eligible projects identified in the FEA. Prior to any funding decision concerning the proposed development, a determination must be made under 49 U.S.C. 44502(b) that the airport development is reasonably necessary for use in air commerce or in the interests of national defense pursuant to 49 U.S.C. 44502(b).

D. Continued close coordination with the Port of Oakland and appropriate FAA program offices, as required, for safety during construction. (FAR Part 139) (49 U.S.C. 44706).

E. Approval of the appropriate amendments to the Oakland International Airport Certification Manual, pursuant to 14 CFR Part 139; and to the Airport Security Plan pursuant to 14 CFR Part 107 (49 U.S.C. 44706).

F. Appropriate amendments to air carrier operations specifications pursuant to 49 U.S.C. 44705.

After careful and thorough consideration of the facts contained herein, the undersigned finds that the proposed Federal action is consistent with existing national environmental policies and objectives as set forth in section 101(a) of the National Environmental Policy Act of 1969 (NEPA) and that it will not significantly affect the quality of the human environment or otherwise include any condition requiring consultation pursuant to section 102(2)(C) of NEPA.

/s/ WILLIAM C. WITHYCOMBE
WILLIAM C. WITHYCOMBE, Regional Administrator
Western-Pacific Region, Federal Aviation Administration

Dec 21, 2000
Date

These decisions, including any subsequent actions approving a grant of Federal funds to the Port of Oakland, are taken pursuant to 49 U.S.C. 40101 et seq. and 49 U.S.C. 47101 et seq., and constitute orders of the Administrator which are subject to review by the Courts of Appeals of the United States in accordance with the provisions of Section 1006 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. Section 46110.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-70169

CITY OF ALAMEDA; CITIZENS LEAGUE FOR AIRPORT SAFETY AND SERENITY; BERKELEY KEEP JETS OVER THE BAY, AN UNINCORPORATED ASSOCIATION, PETITIONERS

v.

FEDERAL AVIATION ADMINISTRATION; PORT OF OAKLAND; COMMISSIONERS, PORT OF OAKLAND, RESPONDENTS

[Filed: July 11, 2002]

ORDER

Before: SCHROEDER, Chief Judge B. FLETCHER and KOZINSKI, Circuit Judges.

The panel has unanimously voted to deny the petition for rehearing. Chief Judge Schroeder and Judge Kozinski voted to deny the petition for rehearing en banc and Judge B. Fletcher so recommended.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the petition for rehearing en banc is rejected.

APPENDIX D

STATUORY PROVISION

1. Section 46110, of Title 49, U.S.C., provides:

§ 46110. Judicial review

(a) FILING AND VENUE.—Except for an order related to a foreign air carrier subject to disapproval by the President under section 41307 or 41509(f) of this title, a person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Under Secretary of Transportation for Security with respect to security duties and powers designated to be carried out by the Under Secretary or the Administrator of the Federal Aviation Administration with respect to aviation safety duties and powers designated to be carried out by the Administrator) under this part may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued. The court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day.

(b) JUDICIAL PROCEDURES.—When a petition is filed under subsection (a) of this section, the clerk of the court immediately shall send a copy of the petition to the Secretary, Under Secretary, or Administrator, as appropriate. The Secretary, Under Secretary, or Administrator shall file with the court a record of any proceeding in which the order was issued, as provided in section 2112 of title 28.

(c) AUTHORITY OF COURT.—When the petition is sent to the Secretary, Under Secretary, or Administrator, the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary, Under Secretary, or Administrator to conduct further proceedings. After reasonable notice to the Secretary, Under Secretary, or Administrator, the court may grant interim relief by staying the order or taking other appropriate action when good cause for its action exists. Findings of fact by the Secretary, Under Secretary, or Administrator, if supported by substantial evidence, are conclusive.

(d) REQUIREMENT FOR PRIOR OBJECTION.—In reviewing an order under this section, the court may consider an objection to an order of the Secretary, Under Secretary, or Administrator only if the objection was made in the proceeding conducted by the Secretary, Under Secretary, or Administrator or if there was a reasonable ground for not making the objection in the proceeding.

(e) SUPREME COURT REVIEW.—A decision by a court under this section may be reviewed only by the Supreme Court under section 1254 of title 28.

Supreme Court, U.S.
FILED
FEB 5 2003

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No. 02-856

In the Supreme Court of the United States

FEDERAL AVIATION ADMINISTRATION, PETITIONER

v.

CITY OF ALAMEDA, CITIZENS LEAGUE FOR AIRPORT SAFETY AND SERENITY, BERKELEY KEEP JETS OVER THE BAY, PORT OF OAKLAND, AND COMMISSIONERS, PORT OF OAKLAND

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO VACATE

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

KIRK K. VAN TINE
General Counsel
Department of Transportation
Washington, D.C. 20590

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In the Supreme Court of the United States

No. 02-856

FEDERAL AVIATION ADMINISTRATION, PETITIONER

v.

CITY OF ALAMEDA, CITIZENS LEAGUE FOR AIRPORT SAFETY AND SERENITY, BERKELEY KEEP JETS OVER THE BAY, PORT OF OAKLAND, AND COMMISSIONERS, PORT OF OAKLAND

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO VACATE

The Solicitor General, on behalf of the Federal Aviation Administration (FAA), respectfully moves that the judgment of the court of appeals be vacated as moot.

1. This case concerns the scope of the courts of appeals' jurisdiction under 49 U.S.C. 46110(a) to review orders of the Federal Aviation Administration (FAA).

Subtitle VII of Title 49, the "Aviation Programs" subtitle, is divided into five parts. Part A is designated "Air Commerce and Safety." The remaining Parts are designated "Airport Development and Noise" (Part B), "Financing" (Part C), "Public Airports" (Part D), and "Miscellaneous" (Part E).

Part A contains its own provision governing judicial review, which states in relevant part:

> [A] person disclosing a substantial interest in an order issued by * * * the Administrator of the Federal Aviation Administration * * * under this part may apply for review of the order by filing a petition for review in the United States Court of Appeals. * * * The petition must be filed not later than 60 days after the order is issued [unless] there are reasonable grounds for not filing by the 60th day.

49 U.S.C. 46110(a). In such a case, the court of appeals has "exclusive jurisdiction" to review "any part of the order." 49 U.S.C. 46110(c).

No analogous provision vests the courts of appeals with exclusive jurisdiction to review all FAA orders issued under Parts B through E. Consequently, the district courts retain federal-question jurisdiction to review most orders issued exclusively under those Parts. Such review is subject to the general judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, and to the six-year limitations period generally applicable to actions against the United States, see 28 U.S.C. 2401(a).

2. a. In December 2000, the FAA issued a Finding of No Significant Impact and Record of Decision (Order), which approved an airport development program for the Oakland International Airport in California. See Pet. App. 6a-40a. The Order recites that it is being issued "pursuant to 49 U.S.C. 40101 [contained in Part A] and 49 U.S.C. 47101 [contained in Part B]," and is "subject to review by the Courts of Appeals" under 49 U.S.C. 46110. Pet. App. 40a. The Order contains determinations under Part A, including determinations

regarding air commerce and air safety. The Order also contains analyses of issues under statutory provisions other than those in Part A. In particular, in the exercise of its airspace management authority under 49 U.S.C. 40103(b), a provision of Part A, the FAA approved the airport layout plan (which depicts the various components of the airport development program for the Airport), determining that the plan would involve a safe and efficient use of navigable airspace. Pet. App. 38a-39a. The Order also contains analyses of issues under statutory provisions other than those in Part A. Thus, the FAA also approved the airport layout plan under 49 U.S.C. 47107(a)(16), a provision of Part B. Pet. App. 39a. And as relevant here, the FAA prepared an environmental assessment, as required under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332, to determine whether a full environmental impact statement was required for the airport development program for the Airport. The FAA determined that the program would not have a significant impact on the environment, thereby relieving the FAA of the obligation to prepare an environmental impact statement. Pet. App. 40a.

b. The City of Alameda, a California municipality, and two private associations, the Citizens League for Airport Safety and Serenity and Berkeley Keep Jets Over the Bay Committee, challenged the Order by filing a petition for review, pursuant to 49 U.S.C. 46110(a), in the United States Court of Appeals for the Ninth Circuit.[1] The petition did not indicate the nature of the challenge. It became evident during briefing that the petitioners (respondents here) were challenging the

[1] The petition, as amended, named the Port of Oakland and its Board of Commissioners as respondents along with the FAA.

Order solely on the ground that the FAA had allegedly failed to conduct a suitable environmental evaluation under NEPA in connection with its approval of the project in the Order. Pet. App. 4a-5a n.3. As relief, the petitioners asked the court of appeals to hold that the Order violated NEPA and to suspend the FAA's approval of the airport layout plan (except its airport roadway component) until the FAA prepared an environmental impact statement that complied with NEPA. City of Alameda, et al., C.A. Br. 66.

The court of appeals held, *sua sponte*, that it lacked appellate jurisdiction under 49 U.S.C. 46110(a) and directed that the case be transferred to the district court. Pet. App. 1a-5a. The court concluded that the fact that the FAA had acted, in part, under Part A was insufficient to establish jurisdiction under Section 46110(a). *Id.* at 4a. The court observed that "[t]he FAA actions *challenged by petitioners* * * * concern themselves with matters covered by Part B, Airport Development and Noise, rather than Part A, that concerns Air Commerce and Safety." *Ibid.* Accordingly, the court concluded that the petitioners in that court had "fail[ed] to disclose a 'substantial interest' in an order issued under Part A," as required by Section 46110(a). *Ibid.* The court denied the FAA's petition for rehearing en banc. *Id.* at 41a.

c. On December 6, 2002, the Solicitor General, on behalf of the FAA, filed a petition for a writ of certiorari to review the court of appeals' decision in this case. The petition explains that the court of appeals departed from the most sensible construction of Section 46110(a) as providing for review of all aspects of orders issued, in whole or in part, under Part A, regardless of the particular portion of the order that is challenged or the particular ground on which the order is challenged.

The petition further explains that the court of appeals' decision squarely conflicts with the decisions of two other circuits applying the statutory predecessor of Section 46110(a), see *Sutton* v. *United States Dep't of Transp.*, 38 F.3d 621, 624-625 (2d Cir. 1994); *National Parks & Conservation Ass'n* v. *FAA*, 998 F.2d 1523, 1526-1528 (10th Cir. 1993), and threatens to complicate and prolong the review of time-sensitive orders approving airport development projects.

d. On December 18, 2002, the petitioners below (respondents City of Alameda, Citizens League for Airport Safety and Serenity, and Berkeley Keep Jets Over the Bay Committee) filed a Notice of Voluntary Dismissal With Prejudice (Notice) in the district court to which this case had been transferred. App. A, *infra*, 1a-2a. The Notice recites that it is given "pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure and the settlement agreement between petitioners and respondent Port of Oakland." *Id.* at 2a. Neither the FAA nor any other component of the United States government is a party to the settlement agreement or participated in its negotiation.

On December 20, 2002, the district court ordered the dismissal of this case with prejudice. App. A, *infra*, 2a. On December 30, 2002, counsel for respondents served notice of the dismissal on the FAA.

3. The voluntary dismissal of this case by the petitioners below (who are respondents herein), and the district court's order dismissing the case with prejudice, have rendered this case moot, thereby precluding any review by this Court of the court of appeals' *sua sponte* jurisdictional ruling. That ruling, however, retains the potential to create significant difficulties in the Ninth Circuit for the FAA (and other components of the Department of Transportation), as well as for

local airport authorities, with respect to the expeditious resolution of all challenges to orders issued under both Part A and other Parts of Subchapter VII of Title 49.

As a result of the court of appeals' ruling, when a party challenges such an order in the Ninth Circuit based only on the FAA's exercise of authority over matters outside Part A (such as NEPA), the challenge would not be subject to the 60-day limitation period of Section 46110(a). That would, as the D.C. Circuit has observed, "completely undo [the] act's requirement of a timely petition for review." *City of Rochester* v. *Bond*, 603 F.2d 927, 935 (D.C. Cir. 1979). It would also subject portions of the order to an additional level of judicial scrutiny, thereby "requiring duplication of the identical task in the district court and in the court of appeals," *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985), and delaying the date on which the order as a whole would become final. Moreover, if one party challenged the order as inconsistent with the requirements of Part A, while another party challenged the order as inconsistent with the requirements of Part B or NEPA, the court of appeals and the district court could, simultaneously or serially, be adjudicating the validity of different portions of the same order, producing "[t]he likelihood of duplication and inconsistency." *City of Rochester*, 603 F.2d at 936. As other circuits have recognized, the rationale for special statutory review provisions "is that coherence and economy are best served if all suits pertaining to designated agency decisions are segregated in particular courts." *Sutton*, 38 F.3d at 625 (quoting *City of Rochester*, 603 F.2d at 936); cf. *Florida Power*, 470 U.S. at 742 (noting the "seeming[] irrational[ity]" of a "bifurcated system" in which "some final orders in licensing proceedings receiv[e] two layers of judicial review and some receiv[e]

only one"). Unless the Ninth Circuit's decision in this case is vacated, however, the government (or other parties) will face the prospect of duplicative judicial proceedings and prolonged uncertainty with respect to the finality of FAA orders involving airport development and safety programs in the States of the Ninth Circuit.

4. This Court's "established practice * * * in dealing with a civil case from a court in the federal system which has become moot while on its way [to the Court] or pending [its] decision on the merits is to reverse or vacate the judgment below." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); see, *e.g.*, *NTA Graphics, Inc.* v. *NLRB*, 511 U.S. 1124 (1993); *Mechling Barge Lines, Inc.* v. *United States*, 368 U.S. 324, 329-331 (1961). The Court has followed that course in cases pending on petition for a writ of certiorari. See, *e.g.*, *Board of Governors* v. *Security Bancorp*, 454 U.S. 1118 (1981); see generally *Munsingwear*, 340 U.S. at 39-40; R.L. Stern et al., *Supreme Court Practice* 327 (8th ed. 2002).

Vacatur is especially warranted here because the parties who filed a petition for review in the court of appeals have since voluntarily dismissed the action, and the district court (to which the case was transferred pursuant to the Ninth Circuit's jurisdictional ruling) has entered an order of dismissal. In other cases in which the party that initiated proceedings in federal court withdrew or abandoned its request for relief while the case was pending before this Court, the Court has vacated the judgment below as moot. See, *e.g.*, *Webster* v. *Reproductive Health Servs.*, 492 U.S. 490, 512-513 (1989); *Frank* v. *Minnesota Newspaper Ass'n*,

490 U.S. 225, 227 (1989) (per curiam); *Deakins* v. *Monaghan*, 484 U.S. 193, 199-201 (1988).[2]

The government is equitably entitled to the remedy of vacatur, because it has been prevented from obtaining review of the court of appeals' jurisdictional ruling for reasons not of its own making. See *U.S. Bancorp Mortgage Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 25 (1994). As noted above, the underlying case became moot as a result of the voluntary dismissal of the action by the parties challenging the FAA's order—a dismissal that was, in turn, based on those parties' settlement with respondent Port of Oakland. All of those non-federal parties were also parties to a related state court case, in which they agreed to the entry of judgment as part of the settlement. Phase Two Agreement ¶ 4.3 (Oct. 8, 2002). The government was not a party to the settlement. Nor did the government participate in the negotiations that produced it. In such circumstances, the government "ought not in fairness be forced to acquiesce in the judgment," *Bonner Mall*, 513 U.S. at 25, which was made unreviewable entirely by the actions of others.[3]

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[2] The United States has previously taken the position that the Court should deny certiorari, even when the case has become moot, if the case would not otherwise warrant review. See Br. in Opp., *Velsicol Chemical Corp.* v. *United States*, 435 U.S. 942 (1978) (No. 77-900); see *Supreme Court Practice*, *supra*, at 327, 830 & n.30. Here, if respondents' dismissal of their petition for review had not rendered the case moot, the Ninth Circuit's jurisdictional ruling would merit the Court's review. As explained above and in the petition for certiorari (at 6-13), the court of appeals' ruling is incorrect, is contrary to the decisions of two circuits (and in tension with the decisions of two others), and presents a question of considerable importance in the expeditious review of FAA orders.

[3] In *Bonner Mall*, the Court denied the petitioner's motion to vacate the judgment below, where the case had become moot by

* * * * *

Accordingly, the petition for a writ of certiorari should be granted and the judgment of the court of appeals should be vacated as moot.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

KIRK K. VAN TINE
General Counsel
Department of Transportation

FEBRUARY 2003

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virtue of a settlement entered into between the petitioner itself and the respondent. The Court observed, however, that its decision should not be understood to mean "that vacatur can never be granted when mootness is produced in that fashion." 513 U.S. at 29. It follows *a fortiori* that vacatur may be granted where, as here, the party seeking such relief did not participate in the settlement that mooted the case.

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. C-02-1780 PJH

CITY OF ALAMEDA, A MUNICIPAL CORPORATION; CITIZENS LEAGUE FOR AIRPORT SAFETY AND SERENITY, A NOT-FOR-PROFIT CORPORATION; BERKELEY KEEP JETS OVER THE BAY, AN UNINCORPORATED ASSOCIATION, PETITIONERS

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION; NORMAN Y. MINETA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF TRANSPORTATION; FEDERAL AVIATION ADMINISTRATION; JANE F. GARVEY, IN HER OFFICIAL CAPACITY AS ADMINISTRATOR OF THE FEDERAL AVIATION ADMINISTRATION; WILLIAM WITHYCOMBE, IN HIS OFFICIAL CAPACITY AS REGIONAL ADMINISTRATOR OF THE FEDERAL AVIATION ADMINISTRATION; PORT OF OAKLAND; AND BOARD OF PORT COMMISSIONERS, PORT OF OAKLAND, RESPONDENTS

NOTICE OF VOLUNTARY DISMISSAL WITH PREJUDICE AND [~~PROPOSED~~] ORDER

NOTICE IS HEREBY GIVEN that pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure and the settlement agreement between petitioners and respondent Port of Oakland, petitioners respectfully request an order voluntarily dismissing the above-captioned action WITH PREJUDICE, with each party to bear its own costs and attorneys' fees.

CITY OF ALAMEDA and CITIZENS LEAGUE FOR AIRPORT SAFETY AND SERENITY

Dated: [12/17/02] By: /s/ [E. CLEMENT SHUTE, JR.]
E. CLEMENT SHUTE, JR.

Dated: [12/18/02] By: /s/ [STEVEN F. PFLAUM by OLA]
STEVEN F. PFLAUM

Dated: [12/18/02] By: /s/ [JOHN SHORDIKE by OLA]
JOHN R. SHORDIKE

IT IS SO ORDERED

/s/ PHYLLIS J. HAMILTON
PHYLLIS J. HAMILTON
United States District Judge

[12/20/02]
Date

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

Case No. C-02-1780 PJH

CITY OF ALAMEDA, A MUNICIPAL CORPORATION;
CITIZENS LEAGUE FOR
AIRPORT SAFETY AND SERENITY, A NOT-FOR-PROFIT
CORPORATION;
BERKELEY KEEP JETS OVER THE BAY, AN
UNINCORPORATED ASSOCIATION, PETITIONERS

v.

UNITED STATES DEPARTMENT OF
TRANSPORTATION; NORMAN Y.
MINETA, IN HIS OFFICIAL CAPACITY
AS SECRETARY OF THE DEPARTMENT
OF TRANSPORTATION; FEDERAL
AVIATION ADMINISTRATION; JANE
F. GARVEY, IN HER OFFICIAL
CAPACITY AS ADMINISTRATOR OF THE
FEDERAL AVIATION ADMINISTRATION;
WILLIAM WITHYCOMBE, IN HIS
OFFICIAL CAPACITY AS REGIONAL
ADMINISTRATOR OF THE FEDERAL
AVIATION ADMINISTRATION; PORT
OF OAKLAND; AND BOARD OF PORT
COMMISSIONERS, PORT OF
OAKLAND, RESPONDENTS

NOTICE OF ENTRY OF ORDER DISMISSING ACTION WITH PREJUDICE

NOTICE IS HEREBY GIVEN that the Court has entered the attached order dismissing the above-captioned action with prejudice.

Dated: [12/30/02] /s/ By: [E. CLEMENT SHUTE, JR.]
E. CLEMENT SHUTE, JR.
Attorney For CITY OF ALAMEDA and CITIZENS LEAGUE FOR AIRPORT SAFETY AND SERENITY

Supreme Court, U.S.
FILED
MAR 24 2003
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(3)

No. 02-856

In the Supreme Court of the United States

FEDERAL AVIATION ADMINISTRATION, PETITIONER

v.

CITY OF ALAMEDA, CITIZENS LEAGUE FOR AIRPORT SAFETY AND SERENITY, BERKELEY KEEP JETS OVER THE BAY COMMITTEE, PORT OF OAKLAND, AND COMMISSIONERS, PORT OF OAKLAND, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI AND TO MOTION TO VACATE

E. CLEMENT SHUTE, JR.
Shute, Mihaly & Weinberger
396 Hayes Street
San Francisco, CA 94102
(415) 552-7272

Attorneys for Respondent Citizens League for Airport Safety and Serenity

JOHN R. SHORDIKE
1826 Yosemite Road
Berkeley, CA 94707
(510) 526-0582

Attorney for Respondent Berkeley Keep Jets Over the Bay Committee

STEVEN F. PFLAUM
Counsel of Record
McDermott, Will & Emery
227 West Monroe Street
Suite 4700
Chicago, IL 60606-5096
(312) 984-3641

CAROL A. KORADE
City Attorney
City of Alameda
DAVID BRANDT
Assistant City Attorney
2263 Santa Clara Avenue, Room 280
Alameda, CA 94501
(510) 748-4544

Attorneys for Respondent City of Alameda

7pp

CORPORATE DISCLOSURE STATEMENT

Respondent Citizens League for Airport Safety and Serenity ("CLASS") is a not-for-profit corporation. Pursuant to Supreme Court Rule 29.6, CLASS states that no parent or publicly held companies own 10% or more of its stock.

In the Supreme Court of the United States

No. 02-856

FEDERAL AVIATION ADMINISTRATION, PETITIONER

v.

CITY OF ALAMEDA, CITIZENS LEAGUE FOR AIRPORT SAFETY AND SERENITY, BERKELEY KEEP JETS OVER THE BAY COMMITTEE, PORT OF OAKLAND, AND COMMISSIONERS, PORT OF OAKLAND, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI AND TO MOTION TO VACATE

Respondents City of Alameda, Citizens League for Airport Safety and Serenity, and Berkeley Keep Jets Over the Bay Committee (collectively, "Respondents") respectfully submit this memorandum in response to the February 19, 2003, letter from the Clerk advising that the Court had directed it to "request that a response be filed to the petition for writ of certiorari and the motion to vacate." Respondents had previously waived their right to respond in accordance with Supreme Court Rule 15.5.

The underlying dispute between these Respondents and co-respondents Port of Oakland and Board of Port Commissioners has been settled. The parties' settlement agreement was reached on October 8, 2002, approximately two months before the Federal Aviation Administration filed its petition for writ of certiorari. (The FAA is not a party to the settlement agreement and was not involved in the settlement negotiations.) The FAA referenced the settlement agreement in its petition, disclosed that

the underlying case may soon be dismissed with prejudice, and signaled its intention, once that occurred, to move this Court to vacate the judgment of the court of appeals. Petition at 14 n.5. That is precisely what has occurred. The district court dismissed the action with prejudice on December 20, 2002, and the FAA filed its motion to vacate on February 5, 2003. *See* motion to vacate at 2a.

In light of the parties' settlement and the dismissal of the case, the Respondents take no position with respect to either the FAA's petition for writ of certiorari or its motion to vacate. For the same reasons, Respondents would respectfully decline to participate if the Court were to consider the merits of the jurisdictional ruling by the court of appeals. However, prior to the settlement and the court of appeals' decision, Respondents had filed their petition for review in the Ninth Circuit on the basis of their understanding that then-existing precedent indicated the court of appeals had exclusive jurisdiction over such petitions pursuant to 49 U.S.C. 46110(a). A copy of the Statement of Jurisdiction from Respondents' opening appellate brief is reprinted in Appendix A hereto.

One final point bears mention. On February 11, 2003, the United States Court of Appeals for the Second Circuit issued a decision that adheres to the jurisdictional ruling and rationale of the Ninth Circuit in this case. *Committee to Stop Airport Expansion v. FAA*, ___ F.3d ___, 2003 U.S. App. Lexis 2404 (2d Cir. February 11, 2003). Respondents are aware of no impediment to the FAA filing a petition for certiorari in that case. This Court thereby would have an opportunity, should it so desire, to address the jurisdictional issue in the context of a live controversy, perhaps obviating the asserted reason for review or vacatur of the decision in this now-moot case.

Respectfully submitted.

E. CLEMENT SHUTE, JR.
Attorney for Respondent
Citizens League for Airport
Safety and Serenity

JOHN R. SHORDIKE
Attorney for Respondent
Berkeley Keep Jets Over the
Bay Committee

STEVEN F. PFLAUM
Counsel of Record
CAROL A. KORADE
City Attorney
DAVID BRANDT
Assistant City Attorney

Attorneys for Respondent
City of Alameda

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-70169

CITY OF ALAMEDA, A MUNICIPAL CORPORATION; CITIZENS LEAGUE FOR AIRPORT SAFETY AND SERENITY, A-NOT-FOR-PROFIT CORPORATION; BERKELEY KEEP JETS OVER THE BAY, AN UNINCORPORATED ASSOCIATION, PETITIONERS

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION; NORMAN Y. MINETA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF TRANSPORTATION; FEDERAL AVIATION ADMINISTRATION; JANE F. GARVEY, IN HER OFFICIAL CAPACITY AS ADMINISTRATOR OF THE FEDERAL AVIATION ADMINISTRATION; WILLIAM WITHYCOMBE, IN HIS OFFICIAL CAPACITY AS REGIONAL ADMINISTRATOR OF THE FEDERAL AVIATION ADMINISTRATION; PORT OF OAKLAND; AND BOARD OF PORT COMMISSIONERS, PORT OF OAKLAND, RESPONDENTS

PETITION FOR REVIEW OF DECISION
OF FEDERAL AVIATION ADMINISTRATION

PETITIONERS' OPENING BRIEF

(List of counsel is on next page.)

(pages omitted)

STATEMENT OF JURISDICTION

The Record of Decision constitutes a Final Order of the Federal Aviation Administration ("FAA") subject to review by this court pursuant to 49 U.S.C. § 46110. *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569 (9th Cir. 1998). This case raises no constitutional claims which would permit review in the district court. *Crist v. Leippe*, 138 F.3d 801, 803 (9th Cir. 1998) (distinguishing district and circuit court jurisdiction as follows: "[d]oes the appeal broadly challenge the constitutionality of the FAA's action — in which case the district court could have jurisdiction — or is the appeal 'inescapably intertwined with a review of the procedures and merits surrounding the FAA's order'?").[1] *See also, Foster v. Skinner*, 70 F.3d 1084, 1087-1088 (9th Cir. 1995).

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[1] In one case, this circuit found that where a petitioner challenged the FAA's revenue use restrictions in its interpretation of the FAA Reauthorization Act of 1996, the action was reviewable only in the district court. *City of Los Angeles v. FAA*, 239 F.3d 1033 (9th Cir. 2001). The court found subject matter jurisdiction lacking under 49 U.S.C. 46110(a) where petitioners made a broad constitutional challenge to an action wholly within Part B of Title 49 Subtitle VII because the appellate court jurisdictional grant applied to Part A. This decision does not affect the court's subject matter jurisdiction in this case because the petitioners raise no constitutional challenges to the FAA actions. *Crist v. Leippe*, 138 F.3d at 804 ("a broad constitutional challenge is a necessary predicate to district court jurisdiction" over FAA orders). Moreover, unlike the situation in *City of Los Angeles v. FAA*, the FAA actions were taken pursuant to both sections A and B of Title 49 Subtitle VII. *See, e.g.*, Petitioners' Excerpts of Record ("PER") 6:01404 (authorizing unconditional approval of the Airport Layout Plan "pursuant to 49 U.S.C. 47107(a)(16) [Part B] and 40103(b) [Part A]") and at 17 ("These decisions . . . are taken pursuant to 49 U.S.C. 40101 *et seq.* [Part A] and 49 U.S.C. 47101 *et seq.* [Part B]."). Where jurisdiction could fall in either the district or appellate court, the circuit court is the appropriate forum. *See e.g., Sutton v. United States Dept. of Transp.*, 38 F.3d 621, 625 (1994) ("[C]ourts of appeals, in actions challenging FAA decisions, have uniformly rejected attempts by litigants to bifurcate issues or to cull out independent claims for review in the district court.") The Supreme Court favors review of agency actions in the circuit courts, "absent a firm indication" that Congress intended district court jurisdiction. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744-45 (1985). Therefore, the

Petitioners City of Alameda, the Citizens League for Airport Safety and Serenity and Berkeley Keep Jets Over the Bay Committee participated in the administrative process and exhausted administrative remedies by commenting on the Revised Draft Environmental Impact Statement ("RDEIS"). PER 6:01283-1340, 6:01346-52. A timely Petition for Review was filed on January 30, 2001, amended February 15, 2001. PER 6:01406-09.

FAA correctly asserted that review should be taken in the court of appeals. PER 6:01405 ("These decisions . . . are subject to review by the Court of Appeals of the United States in accordance with the provisions of Section 1006 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. Section 46110.")

Nonetheless, should the court for any reason find that review in the circuit court is not appropriate, petitioners request, pursuant to 28 U.S.C. § 1631, that the action be transferred to the district court in the interest of justice. *See City of Los Angeles v. FAA*, 239 F.3d at 1037.

Supreme Court, U.S.
FILED
MAR 20 2003
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No. 02-856

In The Supreme Court of the United States

FEDERAL AVIATION ADMINISTRATION

Petitioner

v.

CITY OF ALAMEDA, CITIZENS LEAGUE FOR AIRPORT SAFETY AND SERENITY, BERKELEY KEEP JETS OVER THE BAY, PORT OF OAKLAND, AND COMMISSIONERS, PORT OF OAKLAND

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

JOHN R. REESE
Counsel of Record
Three Embarcadero Center
San Francisco, CA 94111-4067
(415) 393-2000

BARBARA J. SCHUSSMAN
MARC R. BRUNER
1333 N. California Boulevard
Suite 210
P.O. Box V
Walnut Creek, CA 94596-1270
(925) 937-8000

Attorneys for Port of Oakland and Commissioners, Port of Oakland

BINGHAM MCCUTCHEN LLP
Of Counsel

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

The Port of Oakland and Commissioners of the Port of Oakland respectfully respond to the Solicitor General's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit and motion to vacate the judgment of the United States Court of Appeals for the Ninth Circuit.

STATEMENT

1. The Port of Oakland is a division of the City of Oakland, a municipality. The Port of Oakland owns and operates Oakland International Airport in Oakland, California.

2. In December 2000, the Federal Aviation Administration issued a Finding of No Significant Impact and Record of Decision approving a revised Airport Layout Plan for the Port of Oakland's proposed airport development program. See FAA's Petition For A Writ of Certiorari, App. B at 6a-40a. The FAA's Record of Decision states the FAA approved the revised Airport Layout Plan under 49 U.S.C. § 47107(a) and 49 U.S.C. § 40103(b). *Ibid.*, App. B at 39a. Section 47107(a) is within Part B of Subtitle VII of Title 49 of the United States Code. Section 40103(b) is within Part A of Subtitle VII of Title 49 of the United States Code. Thus, the FAA's Record of Decision is expressly based on Part A, as well as Part B of Subtitle VII.

3. In January 2001, within sixty days of the issuance of the FAA's Record of Decision, the City of Alameda and two citizens' groups filed a petition for review in the United States Court of Appeals for the Ninth Circuit. The petition

for review stated in whole: "The City of Alameda, the Citizens League for Airport Safety and Serenity, and Berkeley Keep Jets Over the Bay hereby petition the Court for review of the Federal Aviation Administration's Finding of No Significant Impact and Record of Decision dated December 21, 2000, approving the Airport Development Program at Oakland International Airport." The petition for review did not indicate the legal grounds for the petitioners' claims or the specific portions of the FAA's Record of Decision that were being challenged. In its brief before the Ninth Circuit, the petitioners asked the Court to suspend the FAA's approval of the Airport Layout Plan (except for the Airport Roadway Project component of that Plan) and to enjoin the Port of Oakland from taking action in reliance of the FAA's approval of the Plan.

4. Prior to filing the petition for review of the FAA's Record of Decision, the same petitioners had challenged the Port of Oakland's approval of its airport development program in the Superior Court for the County of Alameda. In August 2001, during the briefing on the merits in the Ninth Circuit, the State of California Court of Appeal issued a final decision requiring the Port of Oakland to take additional actions under the California Environmental Quality Act prior to implementing portions of its airport development program. See *Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs.*, 91 Cal. App. 4th 1344 (2001). The State Court of Appeal decision did not (and could not) resolve the federal law claims that were being litigated in the Ninth Circuit.

5. On November 14, 2001, the Port of Oakland, the City of Alameda, and the two citizens' groups entered into a partial settlement agreement. That agreement did not require dismissal of the federal litigation, nor did it

resolve the disputes between the FAA and the petitioners. Nevertheless, the Port of Oakland provided a copy of the partial settlement agreement to the Ninth Circuit. The FAA was not a party to the partial settlement agreement, and it did not participate in negotiating the partial settlement agreement.

6. On March 18, 2002, after all parties had completed briefing on the merits in the Ninth Circuit, and within a few weeks of the scheduled oral argument, the Ninth Circuit issued an order stating that the Court lacked jurisdiction to hear the case and providing any party who objected to the order 14 days to submit a response. The FAA submitted a response objecting to the order, and the Port of Oakland joined in the FAA's response. On April 4, 2002, the Ninth Circuit issued a final order concluding that it lacked jurisdiction. See FAA's Petition For A Writ of Certiorari, App. A at 1a-5a. Accordingly, the Ninth Circuit transferred the proceeding to the United States District Court for the Northern District of California.

7. On October 8, 2002, the Port of Oakland, the City of Alameda, and the two citizens' groups entered into a second settlement agreement resolving all of the disputes between the settling parties. Among other matters, the settlement agreement required that within ten days following the City of Alameda's receipt of payment of its attorneys' fees from the Port of Oakland, the petitioners would dismiss their federal suit challenging the FAA's approval of the airport development program and revised Airport Layout Plan. Pursuant to the settlement agreement, the petitioners requested dismissal of the federal proceeding on December 18, 2002; the District Court ordered dismissal on December 20, 2002; and the petitioners provided notice of the entry of that order on December

30, 2002. See FAA's Motion To Vacate, App. A & B at 1a-4a. The FAA was not involved in the settlement negotiations, and it was not a party to the settlement agreement requiring dismissal of the federal proceedings.

8. In light of the settlement and dismissal, on January 6, 2003, the Port of Oakland waived its right to respond to the FAA's petition for a writ of certiorari. On or about February 5, 2003, the FAA informed this Court of the settlement and dismissal, and filed a motion to vacate the Ninth Circuit's final order.

9. The Port of Oakland agrees with the arguments submitted to this Court by the Solicitor General on behalf of the FAA. The FAA's Record of Decision states that the FAA's approval of the revised Airport Layout Plan for the Port of Oakland's proposed airport development program was undertaken pursuant to both Part A and Part B of Subtitle VII of Title 49. Accordingly, jurisdiction for the action challenging the Record of Decision was proper in the Ninth Circuit under 49 U.S.C. § 46110(a). The Ninth Circuit appears to have mistaken the petitioners' legal cause of action – failure to comply with the provisions of the National Environmental Policy Act – for the statutory basis for the FAA's Record of Decision. If this Court concludes that the dismissal of the case prevents it from hearing the jurisdictional issue, then the Port of Oakland agrees with the FAA that the Ninth Circuit's judgment should be vacated.

REASONS FOR GRANTING THE PETITION AND/OR VACATING THE JUDGMENT

The Port of Oakland concurs with the arguments raised in the FAA's petition for certiorari. As the FAA explains, the Ninth Circuit's decision misinterprets 49 U.S.C. § 46110(a), conflicts with decisions of other circuit courts, and undermines Congressional intent.

Under 49 U.S.C. § 46110(a), the Court of Appeals has exclusive jurisdiction over a legal claim by "a person disclosing a substantial interest in an order issued . . . under this part" – *i.e.*, Part A of Subtitle VII of Title 49. The FAA's Record of Decision contains a number of determinations under Part A and it expressly states that the FAA approved the Airport Layout Plan for the proposed airport development program based in part on 49 U.S.C. § 40103(b), a statutory provision in Part A. See FAA's Petition For A Writ of Certiorari at 3-4, 8 & App. B at 39a. As the FAA explains, the most straightforward and sensible conclusion is that the petitioners' challenge of the Record of Decision was properly brought in the Court of Appeals.

A recent Second Circuit case that relies on the Ninth Circuit's decision highlights the split of authority in the Courts of Appeal. In that case, the Second Circuit expressly rejected the Tenth Circuit's interpretation of appellate jurisdiction over FAA orders for airport development projects. See *Committee to Stop Airport Expansion v. FAA*, Docket No. 01-4181, 2003 U.S. App. LEXIS 2404, at *11 (2d Cir. Feb. 11, 2003) (rejecting the reasoning of *National Parks & Conservation Assn. v. FAA*, 998 F.3d 1523, 1527-28 (10th Cir. 1993)). This inter-circuit conflict

will only worsen as more jurisdictional disputes arise involving airport projects.

Equally important for the nation's airports, the Ninth Circuit's decision creates substantial uncertainty and confusion for judicial review of FAA orders. Under the logic of the decision, jurisdiction depends *not* on the nature of the FAA order being challenged, but on the petitioners' legal arguments. Thus, the Court concluded that it lacked jurisdiction because the petitioners' legal claims did not raise issues related to Part A. On the other hand, the opinion strongly suggests that appellate jurisdiction is proper where the legal claims are related to matters under Part A. Where, as here, the initial petition for review does not specify any of the legal claims being asserted or which portions of the FAA order are being challenged, it is possible that jurisdiction will not be decided until long after the case has been filed, when the parties submit their briefs. This situation creates enormous inefficiencies – especially in light of the very different statute of limitations that apply to the two different types of actions.

The nation's airports need a predictable, rational, and time-sensitive system of judicial review for decisions about important airport development projects. Such a system had been firmly in place for many years under Title 49. The Ninth Circuit's decision threatens to throw this well-established system into chaos. Without action by this Court, the decision will unnecessarily complicate judicial review of FAA orders approving airport projects and delay vitally needed airport improvements.

For these reasons, the Port of Oakland concurs with the arguments presented by the FAA. In the event the Court concludes that it cannot hear the merits of the case

in light of the settlement and dismissal of the action, the Port of Oakland agrees with the FAA that the Ninth Circuit's jurisdictional order should be vacated.

Respectfully submitted,

JOHN R. REESE
Counsel of Record
Three Embarcadero Center
San Francisco, CA 94111-4067
(415) 393-2000

BARBARA J. SCHUSSMAN
MARC R. BRUNER
1333 N. California Boulevard
Suite 210
P.O. Box V
Walnut Creek, CA 94596-1270
(925) 937-8000

Attorneys for Port of Oakland and Commissioners, Port of Oakland

BINGHAM MCCUTCHEN LLP
Of Counsel

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No. 02-856

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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In the Supreme Court of the United States

No. 02-856

FEDERAL AVIATION ADMINISTRATION, PETITIONER

v.

CITY OF ALAMEDA, CITIZENS LEAGUE FOR AIRPORT SAFETY AND SERENITY, BERKELEY KEEP JETS OVER THE BAY, PORT OF OAKLAND, AND COMMISSIONERS, PORT OF OAKLAND

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

1. Respondents do not dispute that the Ninth Circuit's construction of 49 U.S.C. 46110(a) in this case is erroneous, conflicts with decisions of other circuits, and involves a question of continuing importance.

Section 46110(a) provides that "a person disclosing a substantial interest in an order issued by * * * the Administrator of the Federal Aviation Administration * * * under this part," *i.e.*, Part A of Subtitle VII of Title 49, "may apply for review of the order by filing a petition for review in the United States Court of Ap-

peals." The Ninth Circuit held that Section 46110(a) does not vest the courts of appeals with jurisdiction to review an order issued by the Federal Aviation Administration (FAA) pursuant to its authority under both Part A of Subtitle VII of Title 49 and other Parts of Subtitle VII, when the petitioner's challenge to the order is based on determinations under statutory provisions outside Part A. As previously explained, the Ninth Circuit's holding departs from the most sensible construction of Section 46110(a), conflicts with holdings of the Second and Tenth Circuits, and threatens to complicate and prolong the review of time-sensitive orders approving airport development projects. See Pet. 6-13.

Respondents Port of Oakland et al. agree (Br. 5) that the Ninth Circuit's decision in this case "misinterprets 49 U.S.C. § 46110(a), conflicts with decisions of other circuit courts, and undermines Congressional intent." Those respondents also agree (Br. 6) that the Ninth Circuit's decision involves an issue "important for the nation's airports," because its construction of Section 46110(a) "will unnecessarily complicate judicial review of FAA orders approving airport projects and delay vitally needed airport improvements." Respondents City of Alameda et al., while declining to take a position in this Court on the FAA's petition for certiorari and motion to vacate in light of the parties' settlement and the dismissal of the case, note (Br. 2) that they filed their petition for review below based on their understanding that the courts of appeals have "exclusive jurisdiction * * * pursuant to 49 U.S.C. 46110(a)" of petitions challenging FAA orders such as the one in this case.

Accordingly, respondents offer no reason to conclude that the Ninth Circuit's decision would not warrant

review on certiorari if the case had not become moot by settlement. Indeed, respondents Port of Oakland et al. specifically concur (Br. 5-6) in the FAA's arguments as to why review by this Court would be warranted.

2. Both sets of respondents also confirm that the FAA played no role in their settlement of the case. See Port of Oakland et al. Br. 4 ("The FAA was not involved in the settlement negotiations, and it was not a party to the settlement agreement requiring dismissal of the federal proceedings."); City of Alameda et al. Br. 1 ("The FAA is not a party to the settlement agreement and was not involved in the settlement negotiations."). There is thus no question that the FAA has been prevented from obtaining review and reversal of the Ninth Circuit's statutory jurisdictional ruling for reasons not of its own making. The FAA therefore is equitably entitled to vacatur. See *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 25 (1994).

3. Respondents City of Alameda et al. err in suggesting (Br. 2) that the Second Circuit's recent decision in *Committee to Stop Airport Expansion* v. *FAA*, 320 F.3d 285 (2003), "adheres to the jurisdictional ruling and rationale of the Ninth Circuit in this case." See Port of Oakland et al. Br. 5-6. In fact, the Second Circuit in that case "affirmed the basic reasoning of" its own earlier decision in *Sutton* v. *United States Department of Transportation*, 38 F.3d 621 (1994) (see Pet. 9-10), and made clear that so long as "an FAA action is taken in substantial part pursuant to Part A, jurisdiction will lie exclusively with the circuit courts." *Committee to Stop Airport Expansion*, 320 F.3d at 290. Thus, the court explained, if a challenged FAA order involves "the exercise of authority deriving from both Parts A and B," the courts of appeals "would have jurisdiction to review such an order" under Section 46110(a).

Ibid. The Second Circuit also explained that whether review is available under Section 46110(a) depends on "the nature of the FAA action challenged," not on "how petitioners plead[ed] their case." *Id.* at 291; cf. Pet. App. 4a (Ninth Circuit's holding in this case that review was unavailable because of the nature of the challenge to the FAA action). The Second Circuit held that Section 46110(a) was inapplicable to the order challenged in that case *only* because the court viewed that particular order as not involving any exercise of the FAA's authority under Part A. See 320 F.3d at 288-289.[1]

Accordingly, the Second Circuit's decision in *Committee to Stop Airport Expansion* does not embrace the Ninth Circuit's construction of Section 46110(a). Nor does the Second Circuit's decision suggest that the courts of appeals would not have exclusive jurisdiction under Section 46110(a) to review all challenges to FAA orders that, like the order in this case (see Pet. 3-4), are expressly issued under Part A as well as other Parts of Subtitle VII of Title 49. *Committee to Stop Airport Expansion* thus does not alter the dimensions of the circuit conflict identified in the certiorari petition. Nor does that decision affect the need for this Court to vacate the Ninth Circuit's decision in this case and

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[1] The Second Circuit cited the Ninth Circuit's decisions in this case and in *City of Los Angeles* v. *FAA*, 239 F.3d 1033, 1035 (2001), for the proposition that "Section 46110 does not grant jurisdiction to review orders issued under Part B" of Subtitle VII of Title 49. *Committee to Stop Airport Expansion*, 320 F.3d at 287. As the Ninth Circuit itself recognized, however, the FAA's order in this case was issued "pursuant to both sections [*i.e.*, Parts] A and B of Title 49 Subtitle VII." Pet. App. 4a.

thereby eliminate that precedential ruling in the Ninth Circuit and the circuit conflict that it created.[2]

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For the foregoing reasons and those stated in the petition for a writ of certiorari and the motion to vacate, the petition for a writ of certiorari should be granted and the judgment of the court of appeals should be vacated as moot.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

APRIL 2003

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[2] The government has sought an extension of time until April 30, 2003, in which to file a petition for rehearing or rehearing en banc in *Committee to Stop Airport Expansion*. The Solicitor General has not yet decided whether to file such a petition.